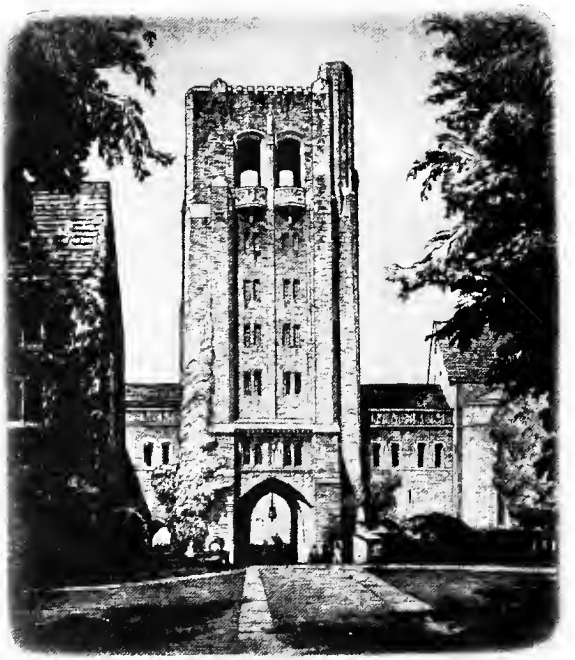

COMMENTARIES

ON THE LAW OF

MARRIAGE AND DIVORCE,

WITH THE

EVIDENCE, PRACTICE, PLEADING, AND FORMS;

ALSO OF

SEPARATIONS WITHOUT DIVORCE,

AND OF THE EVIDENCE OF

MARRIAGE IN ALL ISSUES.

BY

JOEL PRENTISS BISHOP.

VOL. I.

FIFTH EDITION, REVISED AND ENLARGED.

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PREFACE

TO THE FIFTH EDITION.

This edition has been prepared in the following manner.

First. It contains a citation of the authorities which have appeared since the publication of the fourth edition.

Secondly. I have carefully read every word as it stood in the last edition, weighed anew every statement of the law, considered anew every form of expression, and made such alterations and corrections as seemed to be required.

Thirdly. I have added such new matter, and such new views of the old, as the accumulations of nine years, and my studies and experience in legal authorship during that time, have enabled me to do. Those nine years have been particularly prolific in this department of the law, and the added matter is in amount not far from a fourth of a volume.

Fourthly. I have prefixed sub-heads to the sections, and made a few, but not many, new divisions of chapters. The numbering of the sections corresponds to that of the fourth edition.

Fifthly. The Alphabetical Index of Subjects is considerably enlarged.

In the fourth edition, the work was enlarged from one volume to two by adding discussions on pleading and practice in divorce cases, separations without divorce, and the evidence of marriage in issues other than of divorce; the first three editions having been confined to the law of marriage, and the law and evidence in divorce causes. Consequently two volumes became necessary in the place of one, and the whole matter was in a measure rearranged, and the sections were renumbered.

This edition might properly enough be termed the sixth, though it is numbered the fifth. The original fourth edition, consisting of the number of copies which had been printed for the several preceding editions, was so quickly sold, and the general advance in the law of the subject had then been so little, that it seemed neither desirable in itself nor a fair thing to the profession to put forth a new and revised edition, and solicit purchasers for it from among those who possessed the former edition. Consequently my set of the sheets, in which I had made a few minor corrections, was put into the hands of printers who produced a new impression while I was absent from the State, without my seeing the proofs; and, to avoid misapprehension among readers, this new impression was made to bear the old date. I have been obliged to use the sheets of this impression in preparing the present edition; they were found to contain some errors of the press which I much regret, but I trust I have succeeded in eliminating most of them in the present revision.

It was a little more than twenty years ago that the first edition of this work, in one volume, was published.

In it the author, then unknown to fame, and not far advanced in years, undertook the labor of reducing a discordant and heterogeneous mass of judicial decisions and dicta to order, and drawing from the whole, and from principles recognized in other departments of our law, and from the fountains of natural justice, those judicial rules which ought to govern the courts in future marriage and divorce causes. How well or how poorly the work was done it is not for me to say; but it is a simple fact patent to all who look into our reported cases on this subject, that, since this work was published, it has been *the* work, almost the only one, consulted by practitioners and judges examining questions treated of in it. Seldom, indeed, is any other elementary book referred to in the opinions of our American courts in this class of cases, delivered since the first edition of this work appeared. It is the only book which has found sufficient sale to justify publishers in keeping it in the market; though, at the time of its publication, there were two English reprints and one American work soliciting professional patronage. Its views have been adopted by the courts, its language and forms of expression have been wrought into judicial opinions; till, at last, it has ceased to be what it was so peculiarly at first, an aggressive work, and it seems now to have taken the place which many deem to be the only one appropriate for a legal treatise, that of the humble rock, echoing the sounds of wisdom which fall upon it, but sending forth no note of its own.

J. P. B.

Cambridge, June, 1873.

CONTENTS OF VOLUME I.

BOOK I.

GENERAL VIEW OF THE LAW OF MARRIAGE AND DIVORCE.

BOOK II.

THE SOURCES OF AUTHORITY IN OUR MARRIAGE AND DIVORCE LAW.

BOOK III.

IMPERFECTIONS IN THE CONSTITUTION OF THE MARRIAGE.

BOOK IV.

HOW MARRIAGE OR LEGITIMACY IS ESTABLISHED IN EVIDENCE.

BOOK V.

SEPARATIONS WITHOUT JUDICIAL SENTENCE.

BOOK VI.

LEGISLATIVE MARRIAGES AND DIVORCES.

BOOK VII.

JUDICIAL DIVORCES.

INDEX

TO THE CASES CITED IN BOTH VOLUMES.

NOTE. — Where the plaintiff is the King or Queen (Rex or Regina, abbreviated Reg.), the State, People, Commonwealth, United States, or the like, the name of the defendant is, in the following list, put first; such names as In re Jones, Estate of Jones, &c., are indexed, Jones, In re, Jones, Estate of, &c. Otherwise the cases stand here in their natural and unreversed order. The reference letters refer to the *volume*, and figures to the *section*.

MARRIAGE AND DIVORCE.

MARRIAGE AND DIVORCE.

BOOK I.

GENERAL VIEW OF THE LAW OF MARRIAGE AND DIVORCE.

CHAPTER I.

THE LAW OF MARRIAGE.

§ 1. **All Opinions favor Marriage — Polygamy.** — There is nothing connected with the social welfare of the world, concerning which a greater harmony prevails in the opinions of mankind, than the great underlying truths which pertain to the law of marriage, considered as a civil institution. Everywhere the doctrine is received, that men and women should not follow their mere animal instincts in their social relations to one another, but that they should "pair off," to use an expression applied to the birds of the air. In the eastern and some other warm countries, there is rather tolerated than advocated a permission to men to take to themselves more wives than one, — a principle in the law, if such it may be called, unknown in Christian countries, unless we deem the sect of the Mormons to be a Christian sect. Yet, whether a man is to have more wives than one or not, fidelity to the marriage obligation is everywhere inculcated in theory, whatever may be the practice among particular people.

§ 2. **Conflicts of Opinion — Scope of these Volumes — Word "Marriage."** — But when we descend from these general views

to a more minute examination of the subject, we are met by many conflicts of opinion, which have found their way into these earthly laws of ours. It will not be expedient for us, in these volumes, to undertake an exposition of all the particular provisions of law, relating to marriage, wherewith the codes of the different countries in different ages have been burdened. So much only of foreign and of ancient law will be given as may be found necessary to illustrate the laws now existing in the United States. One of the conflicts upon this subject meets us at the very threshold of our inquiry, namely, What is the proper definition of marriage? Plainly, the word marriage is used, and properly so, in two different senses: the one denoting the act of entering into the marriage relation; the other, the relation itself. It is this latter sense which we shall here undertake to ascertain.

§ 3. **Marriage defined.** — Marriage, therefore, — so the author deems the term to be most truly defined, — is the civil status of one man and one woman united in law for life, under the obligations to discharge, to each other and the community, those duties which the community by its laws holds incumbent on persons whose association is founded on the distinction of sex. Its source is the law of nature, whence it has flowed into the municipal laws of every civilized country, and into the general law of nations. And since it can exist only in pairs, and since none are compelled, but all who are capable are permitted, to assume it, — marriage may be said to proceed from a civil contract between one man and one woman, of the needful physical and civil capacity. While the contract is merely an executory agreement to marry, it differs not essentially from other executory civil contracts; it does not superinduce the status; and, on its violation, an action may be maintained by the party injured to recover his damages of the other. But when the contract is executed in what the law regards as a valid marriage, its nature as a contract is merged in the higher nature of the status. And though the new relation — that is, the status — retains some similitudes reminding us of its origin, the contract does in truth no longer exist, but the parties are governed by the law of husband and wife. In other words, when the parties

agreed to be married, they undertook only to assume the marital status; and, on its assumption, the agreement, being fully performed according to its terms, bound them no longer.[1]

§ 4. **Definition discussed — Other Definitions.** — The books of the law contain numerous definitions of marriage, and the foregoing differs from every former one. It is free from some of the objections which may well be urged against all former definitions, whatever imperfections it has of its own. We never find, in any definition, a perfect guide to the law, pointing us, as the mariner's compass does the mariner, to the true course, wherever we may be on the wide ocean of investigation. Were we possessed of definitions of this description, an author need only announce them, and his work would be done. But, though a legal definition cannot be compared to the mariner's compass, it may still be likened to figures and marks on the compass-box, misleading when not correct.

§ 5. **Continued — Contract — Religious Vow.** — In law writings generally, marriage is denominated a contract; yet it is said to be more than a contract, and to differ from all other contracts.[2] The principal division of opinion has been, whether it is to be deemed a civil contract, or a religious vow.[3] The Roman Catholic Church holds it to be a sacrament; and, though Protestants do not generally so esteem it, they account it as of Divine origin, and invest it with the sanctions of religion.[4] Therefore it has been said, that, "according to juster notions of the nature of the marriage contract, it is not merely a civil or a religious contract; and at the present time it is not to be considered as originally and simply one or the other."[5] Yet all the decisions attest, that, however deeply the religious nature of marriage may engage the affections of the community, the law leaves this nature to the sole care of religion,[6]

[1] And see 1 Bishop Mar. Women, § 23–26.

[2] Townsend *v.* Griffin, 4 Harring. Del. 440; Maguire *v.* Maguire, 7 Dana, 181, 183; Miles *v.* Chilton, 1 Robertson, 684, 694; Dickson *v.* Dickson, 1 Yerg. 110, 112. But see The State *v.* Fry, 4 Misso. 120, 179; Londonderry *v.* Chester, 2 N. H. 268; Holmes *v.* Holmes, 6 La. 463.

[3] Lindo *v.* Belisario, 1 Hag. Con. 216, 230, 4 Eng. Ec. 367, 373.

[4] Story Confl. Laws, § 108, 209.

[5] Lord Stowell, in Lindo *v.* Belisario, supra, 4 Eng. Ec. 374; Fornshill *v.* Murray, 1 Bland, 479.

[6] 1 Bl. Com. 433.

and contemplates it only as a civil institution.[1] Naturally, therefore, to distinguish marriage as the law views it from marriage as a religious rite, judges and text-writers have hitherto, even in their definitions, almost uniformly designated it by the term "contract," a "civil contract." Thus Shelford says: "Marriage is considered in every country as a contract, and may be defined to be a contract according to the form prescribed by the law, by which a man and woman, capable of entering into such a contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and his wife."[2] Again, it is said that "marriage is a contract having its origin in the law of nature antecedent to all civil institutions, but adopted by political society, and charged thereby with various civil obligations. It is founded on mutual consent, which is the essence of all contracts; and is entered into by two persons of different sexes, with a view to their mutual comfort and support, and for the procreation of children."[3] Other definitions give the idea of contract a more subordinate position. Thus Ayliffe defines: "Marriage is a lawful coupling and joining together of a man and woman in one individual state or society of life, during the lifetime of one of the parties; and this society of life is contracted by the consent and mutual good-will of the parties toward each other."[4] And the authorities agree in distinguishing it from other species of contract.

§ 6. **Marriage distinguished from Ordinary Contracts.** — Some of the peculiarities of marriage, as distinguished from ordinary contracts, are forcibly stated by Lord Robertson, a Scotch judge, in a passage approvingly quoted by Judge Story[5] and by Mr. Fraser.[6] "Marriage," he observes, "is a contract *sui generis*, and differing in some respects from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The

[1] Dumaresly *v.* Fishly, 3 A. K. Mar. 368; Jenkins *v.* Jenkins, 2 Dana, 102.

[2] Shelford Mar. & Div. 1.

[3] Rogers Ec. Law, 2d ed. 595, tit. Marriage. See also 1 Bl. Com. 433.

[4] Ayl. Parer. 359.

[5] Story Confl. Laws, § 109–111.

[6] 1 Fras. Dom. Rel. 88. See also Shelford Mar. & Div. 16.

contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The *status* of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties; but it differs from other contracts in this, that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation over which the parties have no control by any declaration of their will; it confers the *status* of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot, in general, amongst civilized nations, be dissolved by mutual consent; and it subsists in full force, even although one of the parties should be forever rendered incapable, as in the case of incurable insanity, or the like, from performing his part of the mutual contract. No wonder that the rights, duties, and obligations arising from so important a contract should not be left to the discretion or caprice of the contracting parties, but should be regulated in many important particulars by the laws of every civilized country." [1]

§ 7. **Continued.** — Lord Bannatyne, another Scotch judge, has observed: "Though the origin of marriage is contract, it is in a different situation from all others. It is a contract coeval with, and essential to, the existence of society; while the relations of husband and wife, parent and child, to which it gives rise, are the foundation of many rights acknowledged all the world over, and which, though differently modified in different countries, have everywhere a legal character altogether independent of the will of the parties. . . . The rights arising from the relation of husband and wife, though taking their origin in contract, have yet, in all countries, a legal character, determined by their particular laws and usages, altogether independent of the terms of the contract,

[1] Lord Robertson, in Duntze *v.* Levett, Ferg. 68, 385, 397, 3 Eng. Ec. 360, 495, 502.

or the will of the parties at the time of entering into it." [1] As forcibly illustrating the truth of the latter remark, we may quote another by Lord Robertson, who says: "If a man in this country were to confine his wife in an iron cage, or to beat her with a rod of the thickness of the judge's finger, would it be a justification in any court [in Scotland] to allege, that these were powers which the law of England conferred on a husband, and that he was entitled to the exercise of them, because his marriage had been celebrated in that country?" [2]

§ 8. **Continued — Legislative Divorces — "Impairing Obligation of Contracts."** — Language similar to the foregoing has been employed also in the American tribunals. Thus, in a Kentucky case, Robertson, C. J., observed: "Marriage, though in one sense a contract, — because, being both stipulatory and consensual, it cannot be valid without the spontaneous concurrence of two competent minds, — is, nevertheless, *sui generis*, and unlike ordinary or commercial contracts is *publici juris;* because it establishes fundamental and most important domestic relations. And, therefore, as every well-organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and cannot, like *mere contracts*, be dissolved by the mutual consent only of contracting parties, but may be abrogated by the sovereign will, either with or without the consent of *both parties*, whenever the public good, or justice to both or either of the parties, will be thereby subserved. Such a remedial and conservative power is inherent in every independent nation, and cannot be surrendered, or subjected to political restraint or foreign control, consistently with the public welfare. And therefore marriage, being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing

[1] Lord Bannatyne, in Duntze *v.* Levett, Ferg. 401, 3 Eng. Ec. 505.

[2] Lord Robertson, in Duntze *v.* Levett, Ferg. 399, 3 Eng. Ec. 504. "It must be remembered, that marriage is a contract altogether of a peculiar kind, — that it stands alone, and can be assimilated to no other contract whatever." Mr. Commissary Ross, in Gordon *v.* Pye, Ferg. 276, 339, 3 Eng. Ec. 430, 468.

the obligation of contracts. The obligation is created by the public law, subject to the public will, and not to that of the parties." [1]

§ 9. **Continued.** — So, in the Supreme Court of Tennessee, it was remarked: "By the English canon and ecclesiastical law, this union of marriage is of a nature so widely differing from ordinary contracts; creating disabilities, and conferring privileges, between husband and wife; producing interests, attachments, and feelings, partly from necessity, but mainly from a principle in our nature; which together form the strongest ligament in human society, without which, perhaps, it could not exist in a civilized state; it is a connection of such a deep-toned and solemn character, — that society has even more interest in preserving it than the parties themselves. So it has been deemed in all societies, civilized, and not corrupt, in all ages." [2] And in a Delaware case the court said: "The marriage contract is one of a peculiar character, and subject to peculiar principles. It may be entered into by persons who are not capable of forming any other lawful contract; it can be violated and annulled by law, which no other contract can; it cannot be determined by the will of the parties, as any other contract may be; and its rights and obligations are derived rather from the law relating to it, than from the contract itself." [3]

§ 10. **Continued.** — In a more recent case, Ames, C. J., delivering the opinion of the Rhode Island court on a question of the right to take jurisdiction over a cause of divorce where the defendant was not domiciled within the State, and where also personal service on him could not be made, observed: "*Marriage*, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic *relations*. In strictness, though formed by contract, it signifies the *relation* of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and, as to these, uncontrollable by any contract

[1] Maguire *v.* Maguire, 7 Dana, 181, 183.

[2] Dickson *v.* Dickson, 1 Yerg. 110, 112, opinion by Catron, J.

[3] Townsend *v.* Griffin, 4 Harring. Del. 440, 442. See further authorities cited ante, § 5. That marriage is to be viewed rather as a status than as a contract, see Noel *v.* Ewing, 9 Ind. 37, 49, 50.

which they can make. When formed, this relation is no more a contract than a 'fatherhood' or 'sonship' is a contract. It is no more a contract than serfdom, slavery, and apprenticeship are contracts; the latter of which it resembles in this, that it is formed *by* contract. To this relation there are two parties, as to the others; two or more interested, without doubt, in the existence of the relation, and so interested in its dissolution. These parties are placed by the relation in a certain relative state or condition, under the law, as are parents and children, masters and servants; and, as every nation or state has an exclusive sovereignty and jurisdiction within its own territory, so it has exclusively the right to determine the domestic and social condition of the persons domiciled within that territory. It may, except so far as checked by constitution or treaty, create by law new rights in, or impose new duties upon, the parties to these relations, or lessen both rights and duties; or abrogate *them*, and so the *legal* obligation of the relation which involves them, altogether. This it may do, with the exception above stated, as to some relations, by *law*, when it wills; declaring that the legal relation of master and slave, for instance, shall cease to exist within its jurisdiction; or for what cause or breaches of duty in the relation, this, or the legal relation of husband and wife, or of parent and child, may be restricted in its rights and duties, or altogether dissolved, through the judicial intervention of the courts." [1]

§ 11. **Continued.** — Many more illustrations of the difference between marriage viewed as a contract, and ordinary civil contracts, have been given by judges and law writers. The subject is perhaps sufficiently elucidated already; but Mr. Fraser, after making some pertinent observations of his own, quotes Lord Stair as follows: "Obligations arising from voluntary engagement take their rule and substance from the will of man, and may be framed and disposed of at his pleasure; but so cannot marriage, wherein it is not in the power of the parties, though of common consent, to alter any substantial; as to make the marriage for a time, or take the power over the wife from the husband and place it in her or any other, or

[1] Ditson *v.* Ditson, 4 R. I. 87, 101, 102.

the right of provision and protection of the wife from her husband, and so of all the rest; which evidently [listen to this singular logic!] demonstrateth, that it is not a human but a Divine contract."[1]

§ 12. **Marriage an Institution of Society — Consequences of the Doctrine.** — The institution of marriage, commencing with the race, and attending man in all periods and in all countries of his existence, has ever been considered the particular glory of the social system. It has shone forth, in dark countries and in dark periods of the world, a bright luminary on his horizon. And but for this institution, all that is valuable, virtuous, and desirable in human existence, would long since have faded away in the general retrograde of the race, and in the perilous darkness in which its joys and hopes would have been wrecked together. And as man has gone up in the path of his improvement, and a purer light has surrounded him, still has this institution of marriage, receiving accessions of glory with every step of the race toward its ultimate glory, remained the first among the institutions of human society. And the idea, that any government could, consistently with the general well-being, permit this institution to become merely a thing of bargain between men and women, and not regulate it by its own power, is too absurd to require a word of refutation. If, then, marriage is to be cherished by the government, as the first and choicest object of its regard, surely the government will retain the right to regulate whatever pertains to marriage in its own way, and to modify the incidents of the relation from time to time as itself pleases. And while it will hold this right absolute, not to be controlled by the dictation of individuals, it will thus promote, in the highest degree, individual interests. Consulting individual interests, however, and looking to the first principles of natural equity, it will not wantonly adopt any rule which is inherently oppressive toward its subjects. It will consequently cause its subjects to assume the matrimonial status only when they consent to assume it; and it will not ruthlessly interfere with such mere incidents of the relation as the mutual property rights of the parties. But the fact, that parties enter into

[1] 1 Fras. Dom. Rel. 89, referring to Stair, 1, 4, 1.

marriage only over the threshold of a contract, furnishes all the foundation there exists for the exceedingly loose definition which terms it a contract.

§ 13. **Continued — All Presumptions favor Marriage.** — What is said in the last section conducts us to the further observation, that, though marriage is thus only a political and social status, viewed as the law views it; still, as seen from the religious and moral stand-point, it is an earthly and even a heavenly interest transcending all other interests of a social kind. It is, moreover, a thing of natural right; that is, all persons are naturally entitled to enter into the marriage relation, at a proper time and under proper circumstances. Therefore every court, in considering questions not clearly settled or defined in the law, should lean toward this institution of marriage; holding, consequently, all persons to be married who, living in the way of husband and wife, may accordingly be presumed to have intended entering into the relation, unless the rule of law which is set up to prevent this conclusion is distinct and absolute, or some impediment of nature intervenes. This proposition is indeed sustained in part by the well-recognized maxim, *Semper præsumitur pro matrimonio*,[1] a maxim too often practically overlooked by our tribunals; but, further than this, in all cases the presumptions both of law and of fact should be carried to the very verge to uphold a marriage, where marriage was meant by the parties. This particular topic will be further considered, when we come to treat, in subsequent pages, of the law of the evidence of marriage.[2]

§ 14. **Property Rights.** — The law may, and to some extent does, allow the parties to regulate, by an antenuptial agreement, to survive the assumption of the status, the rights of property between themselves.[3] And we may lay down the broad proposition, that a difference exists between the marriage status, and those property rights which are attendant upon, and more or less closely connected with it. Lord Stowell has well remarked, that "rights of property are

[1] Piers *v.* Piers, 2 H. L. Cas. 331; post, § 457.

[2] See post, § 457–459.

[3] On this subject, consult the author's work on the law of "Married Women."

attached to it on very different principles in different countries; in some, there is a *communio bonorum;* in some, each retain their separate property; by our law it is vested in the husband. Marriage may be good independent of any considerations of property, and the *vinculum fidei* may well subsist without them."[1] The distinction is fully established in the American courts.[2] And we shall find, as we pursue our investigations, that it is a distinction of the very highest importance in the law, whether viewed practically or theoretically.

§ 15. **Continued — How Antenuptial Agreements regarded — The Nude Status.** — While, however, the law thus permits the married persons to regulate somewhat, by an antenuptial agreement, their property rights with each other, it furnishes the rule to be applied in the absence of such an agreement, and presumes, that, where they failed to establish a different rule of their own, they mutually consented to be governed by the rule of the law. And we may well regard an agreement of this kind, and the rule of law to govern the parties in the absence of the agreement, and perhaps all the rules which concern their relations to each other respecting mere property, as not belonging to the status itself; but rather as being the drapery hung about the status, giving it ornament and hue, while really forming of it no part. Denude the status of this drapery, and nothing remains but the shadow of its origin lying upon our memories which bears even the similitude of a contract. No suit at law or in equity, sounding in contract, and going to the marital relation itself, can be maintained between husband and wife during their lifetime; and, after the death of one of them,[3] an action of this nature will not lie against the representatives of the deceased. And where there is no remedy known to the law, not merely where the remedy is suspended for the want of a tribunal competent to administer it, there is no right.[4] The suit for divorce, we

[1] Lindo *v.* Belisario, 1 Hag. Con. 216, 231, 4 Eng. Ec. 367, 374.

[2] Holmes *v.* Holmes, 4 Barb. 295, 301; Maguire *v.* Maguire, 7 Dana, 181; Harding *v.* Alden, 9 Greenl. 140; Crane *v.* Meginnis, 1 Gill & J. 463; Townsend *v.* Griffin, 4 Harring. Del. 440; Sanford *v.* Sanford, 5 Day, 353.

[3] And see McCormick *v.* McCormick, 7 Leigh, 66; Shaw *v.* Thompson, 16 Pick. 198.

[4] See Holmes *v.* Holmes, 4 Barb.

shall hereafter see, is not an action upon contract, but a proceeding *sui generis*, founded on the violation of duties enjoined by law, and therefore resembling more an action of tort than of contract.[1]

§ 16. **Further Views of Marriage as a Status — Parent and Child — Guardian and Ward.** — The husband is under obligation to support his wife; so is he to support his children. The obligation in neither case is one of contract, but of law. The relation of parent and child, equally with that of husband and wife, from which the former proceeds, is a civil status; and a strong resemblance exists between the legal characters of these two relations, much stronger than between either of them and the relation of parties to ordinary contracts. Another similitude is that of guardian and ward; the guardianship being assumed voluntarily, while the mutual obligations and duties it imposes are created by law.

§ 17. **Continued.** — It is not surprising, therefore, that the sagacious mind of Judge Story prompted him to pen the following note, found in his volume on the Conflict of Laws: "I have throughout," he says, "treated marriage as a contract in the common sense of the word, because this is the light in which it is ordinarily viewed by jurists, domestic as well as foreign. But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belong to ordinary contracts."[2] Again he says: "Marriage is not treated as a mere contract between the parties, subject, as to its continuance, dissolution, and effects, to their mere pleasure and intentions. But it is treated as a civil institution, the most interesting and important in its nature of any in society."[3]

§ 18. **Importance of thus changing the Definition of Marriage.**

295, 301, 302. "It is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress." 3 Bl. Com. 109. *Ubi jus ibi remedium*, is a maxim of the law, concerning which see Broom. Leg. Max. 146.

[1] Vol. II. § 230–235.

[2] Story Confl. Laws, § 108, note.

[3] Story Confl. Laws, § 200.

— In England and Continental Europe, little inconvenience can result from designating a perfected marriage by the word contract, rather than status; for the jurists of those countries are not troubled with many of the peculiar questions of constitutional law and of the conflict of laws relating to divorce, which, arising under the constitutions of the United States and of the several States of this Union, have proved more embarrassing than almost any other to our courts, and have led to irreconcilable diversities of decision. But no one can read the conflicting decisions of the American tribunals on this subject without perceiving, that the chief embarrassment has arisen from the tendency to apply the rules governing contracts to the status of marriage, owing to the fact of marriage having been so commonly defined by courts and jurists as being a contract. And no learned inquirer can fail to perceive, that those judges who have looked most completely through and beyond the written definitions of marriage, to the thing itself, have drawn rules best calculated to harmonize conflicting interests, preserve the rights of the individual State without interfering with those of other States or of the general government, and redress the wrongs of citizens. Definitions are not necessarily law; and legal writers are bound to reform definitions, as lexicographers do, so that they may truly describe the object intended. Thus, to say that marriage is a contract, when speaking of the marital condition, not of the agreement to assume it, is, as we have seen,[1] according to the current of the authorities, inaccurate; since they further declare, that it differs in many particulars from other contracts. And when the differences are pointed out, we find that they have covered every quality of the marriage, and left uncovered nothing of the contract. All is submerged in the status. To term marriage, therefore, a contract, is as great a practical inconvenience as to call a certain well-known engine for propelling railroad cars "a horse," adding, "but it differs from other horses in several important particulars;" and then to explain the particulars. More convenient would it be to use at once the word locomotive.

§ 19. **How in these Pages — Distinctions.** — Throughout these

[1] Ante, § 5 et seq.

pages, therefore, the relation of marriage will be designated by the words *status of marriage*, as signifying the same thing which is usually meant by the phrase "contract of marriage." And although this greater accuracy of expression will not preclude the necessity of entering into extended statements of the law, it will enable the writer to make his statements more accurately apprehended by the reader, than he could readily do by employing a word whose intrinsic meaning is, as we have seen, entirely different from any idea which any author who might use the word would desire his readers to derive from its use. At the same time, while the author discards the expression "contract of marriage," as denoting the status, he retains it when he has occasion to describe what is accurately described by the expression. For, in the language of Bigelow, J., sitting in the Massachusetts court — "Whatever question or controversy may exist among legal writers and jurists concerning the nature of the relation subsisting between husband and wife after marriage, — whether the rights and liabilities of the parties are then to be regulated and governed by the principles applicable to all civil contracts, or the contract is to be considered as merged in the higher nature of the status created by the agreement of the parties, — all the authorities concur in the conclusion that marriage has its origin and foundation in a purely civil contract."[1] To constitute the status, there must first be a contract; as, to constitute a butterfly, there must first be a worm.[2] There are various forms of the agreement to marry, or the agreement of marriage: it may be an agreement to marry at a particular time, or an agreement of present marriage; the latter agreement may amount to a present marriage, or it may not; but, in either case such agreement is truly a contract of marriage. In a state of nature, observes Lord Stowell, the contract of present marriage alone, without form or ceremony superadded, constitutes of itself complete marriage.[3] But the laws of many, and perhaps most, civilized countries have added other preliminaries; though philosophically they may all be resolved into this one, since the law does not recognize as a contract what is entered into con-

[1] Little *v.* Little, 13 Gray, 264, 266.
[2] Ante, § 3, 12, 18.
[3] Lindo *v.* Belisario, 1 Hag. Con. 216, 230, 4 Eng. Ec. 367, 374.

trary to law. What are the provisions of law regulating, in our country, the entering into of that contract which superinduces the status of marriage, is a question which will occupy several chapters in the present volume.[1]

§ 20. **Matrimonial Forms — Evils of Inconsiderate Legislation.** — These preliminary views will suffice for this chapter. Yet the writer cannot dismiss the chapter without adding here, in advance, his own personal protest against certain doctrines which, rather of legislation than of law, have wrought great havoc with marriage in England, and somewhat threaten our own country. There was a time when the Anglo-Saxon race, though rude and uncultivated in modern chicanery, never inflicted the disgrace of concubinage on a woman who lived with one man, and one man only, as his wife, and bore him children, unless the man was of too near affinity or consanguinity to her, or unless he had another wife to whom he was earlier married. But in these days of modern refinement, many an Anglo-Saxon woman learns, or her offspring after she is dead learns, that some slip in the form of marriage has made her a sort of select strumpet, and her children it has made bastards. Men who like to deceive honest women, and men who value riches in a wife, or a settlement, more highly than true marriage, admire this; and they consider the Scotch people, who do not like it, and the people of some of our States, who also do not like it, to be, by reason of their want of love for the refinement, almost barbarians. May barbarism, if this is such, long prevail in the United States!

CHAPTER II.

THE LAW OF DIVORCE.

§ 21. **Diversities of Opinion — Introductory Views.** — Though there is, as we have seen,[2] a general concurrence of opinion throughout the world in the doctrine that man should exist,

[1] Post, § 124–340. [2] Ante, § 1.

male and female, in pairs; still, there is a wide diversity of sentiment upon the further question, — For what causes shall the relation of marriage be dissolved, and who, in each particular instance, shall judge of the sufficiency of the causes or facts alleged? It is not the plan of the author to enter, in his law books, much into discussions of what the law should be, in distinction from what the law is; yet it seems necessary, in this instance, to depart somewhat from the general plan. The departure, however, is only apparent, not real; because, in treating of this question of divorce, we are obliged frequently to inquire after the true policy of the law, in order to determine what the law truly is where judges differ.

§ 22. **As to the History of Divorce Law.** — In the first three editions of this work, the author traced, somewhat at large, the history of opinions and of law upon this question of divorce. Yet the historical sketch as thus traced lay too much in outline, descending too little into those minuter things which distinguish the living light from its dead and buried counterfeit, to be of especial practical service to the lawyers of the present day. Therefore, as it would too much increase the size of the work to fill up the outline, the sections devoted to this topic are omitted from the later editions; not, however, to the entire exclusion of historical reference.

§ 23. **Old Ideas and Practices — Early Roman Laws.** — There are men in all ages who weep for the degeneracy of their times, and sigh for the return of the old, which they deem to be better than the new. Some there are with us, who mourn to see unhappy marriages dissolved, and long for the days of early Rome to come to our Republic; "for," they tell us, "in those blessed days men and women were married once for all, and they never sought divorce." But could we see the true picture of those early days of Rome, we might perhaps exclaim, "The world is moving on; let us take what we have in the present with thankfulness, and when we sigh, sigh rather for the future than the past." We know, indeed, that the history of early Rome, and her early law, are together involved in obscurity. But the historical theory now prevailing is, that, although the twelve tables allowed considerable latitude of divorce, yet in consequence of great purity in the public morals,

and a strong sentiment against the dissolution of marriage, no instance of divorce occurred during the first five hundred years of Roman history! The first Roman divorce is said to have been that of Spurius Carvilius Ruga, who, A. U. C. 523, B. C. 231, repudiated his wife, whom he much loved, because of her barrenness; being impelled thereto by an oath which the censors had compelled him to take, that he would give children to the republic. Be this, however, as it may, divorces became afterward common at Rome; and they were allowed pretty much at the pleasure of either of the parties.[1] And there have been, even down to the present day, men wise enough to doubt, whether it is really true that during five hundred years of the Roman republic the law allowed of divorce, yet no unhappy couple was ever found to ask for such a remedy.[2] Still, the fiction serves an end; for we frequently meet with the argument, supposed to militate against the policy of permitting divorce, that Rome in her palmiest ages had no divorces, though her laws allowed them. One cannot fail of seeing how much more heavily this argument bears the other way; because it recognizes the fact, palpable in reason also, that corruption in the public depends, not on the laws enacted for the relief of persons who have received injury from the corruption, but on other things.

§ 24. **Later Roman Law — Origin of the Notion of Indissolubility.** — Tracing the Roman law down from those early times, we find, that, during all the ages in which its light is distinctly discernible, it allowed greater or less latitude of divorce; and the doctrine of indissolubility was engrafted on the law, not by the wise men who at any time swayed the civil affairs of Rome, but by the Roman Church, as a religious tenet. This doctrine is believed to have been first made a general tenet of the church by the Council of Trent, in the year 1653. It was never accepted by the Greek or Eastern Church.[3]

[1] Rees Cyc. art. Divorce; Head *v.* Head, 2 Kelly, 191, 208, Nisbet, J.; Encyc. Amer. art. Divorce; 1 Burge Col. & For. Laws, 641.

[2] Brower de Jure Connub. p. 730, 731; Taylor Civ. Law, 359. See 1 Fras. Dom. Rel. 646; 2 Kent Com. 103.

[3] See further, on the law of divorce, and its history in different ages and countries, 1 Fras. Dom. Rel. 647 et seq.; Tebb's Essay on Adultery and Divorce, *passim;* Rees Cyc. art. Divorce; Encyc. Amer. Id.; Brewster's Encyc. Id.; 2 Kent Com. 102 et seq.; Page on Divorce, 1 et seq.; Rogers

§ 25. **Mosaic Law — Law of the New Testament — Adultery — Desertion.** — The Mosaic law, as generally interpreted, allowed the husband to be the sole judge of the causes for which he might put away his wife; and this was equivalent to permitting him to divorce her at pleasure.[1] The opinion is somewhat current among Protestant divines, that this liberty of divorce was intended by Christ to be restricted to the single cause of adultery;[2] the Church of Rome holding, that not even adultery

Ec. Law, 2d ed. 359, note; 1 Lane's Modern Egypt, 193 et seq.; 1 Burge Col. & For. Laws, 640. In Hanks *v.* Hanks, 3 Edw. Ch. 469, is a sketch of the history of divorce in France. In Burtis *v.* Burtis, 1 Hopkins, 557, is a history of divorce in the State of New York. As to North Carolina, see 1 Car. Law Repos. 137, 413; 2 ib. 129; Collier *v.* Collier, 1 Dev. Eq. 352; Dickinson *v.* Dickinson, 3 Murph. 327. As to New Hampshire, see Parsons *v.* Parsons, 9 N. H. 309; Clark *v.* Clark, 10 N. H. 380.

[1] Deut. xxiv. 1. The words are, "because he has found some uncleanness in her." Some have supposed, that they authorize divorce merely in the case of her adultery; but as, by the same law, adultery was to be punished by death, a broader meaning must evidently be given to these words. Rees Cyc. art. Divorce.

[2] Matt. v. 32. The words are: "Whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery; and whosoever shall marry her that is divorced committeth adultery." I do not propose to give any views of my own upon the interpretation of this passage of Scripture; neither am I of those who hold, that God sent Scripture to us to serve either as a provocative to hair-splitting, on the one hand, or as a band with which to bind our common sense, on the other hand. Milton contends, that by this language Christ did not intend to change at all the Jewish law on the subject of divorce. In support of this view, he cites the seventeenth verse of the same chapter, where it is said, that he did not come to destroy the law, but to fulfil. It is observable, that both in the original Greek, and in the English translation, the offence spoken of is *fornication*, which could be committed only *before* marriage; but no one supposes antenuptial incontinence to be a just ground of divorce; consequently we must seek some other, perhaps metaphorical, meaning for the word. Milton quotes Grotius, who "shows, that fornication is taken in Scripture for such a continual headstrong behavior as tends to plain contempt of the husband, and proves it out of Judges xix. 2, where the Levite's wife is said to have played the whore against him, which Josephus and the Septuagint, with the Chaldean, interpret only of stubbornness and rebellion against her husband; and to this," he continues, "I add, that Kimchi and the two other rabbies who gloss the text, are in the same opinion." That literal adultery was not meant by this word fornication, he argues from the further consideration, that adultery was punishable by death, and so divorce could be of no importance in such a case. Milton's Prose Works, London ed. of 1848, by St. John, vol. 3, p. 256, 396. Dr. Taylor considers, that the word in the original "can with no propriety be rendered adultery." But assuming that it can, he adds: "A very sensible writer now before me has given the word this turn; namely, that no cause for separation could be good, except adultery, or such facts as had the nature, the *rationem*, of adultery; such as were like it, tended to it, or, in short, would finally defeat and interrupt the destined end of this institution, as adul-

is sufficient without the consent of the Pope. But other Protestants, and, as we have seen, the Greek Church, permit a more

tery actually did." And he remarks of some of the words of Christ in restraint of divorce, as reported in the Evangelists, that they seem to allow of *no* exception, but are to be taken in a general sense, subject, like all other general words, to exceptions. Others, "immediately following, admit of *one* [exception] at least, which is said to be that of fornication. To which may be added, that his Apostle, who spake by his authority, has added another; namely, that of malicious desertion, if indeed it be another, and not comprehended under the former." Elements of the Civil Law, p. 351. But still, assuming the word fornication to mean adultery here, it is further suggested, that Christ, addressing a people among whom polygamy was allowed, — so that when the wife ceased to discharge, *toward her husband*, the duties enjoined by marriage, she ceased in fact to be a wife, and he could marry another, and thus the question of his right to divorce her could not arise, — had reference, in the above passage, solely to what was really asked of him, as he knew the matter to lie in the mind of his questioners; namely, whether a man might put away a wife who *adhered to him*, and *discharged her duties as wife;* and he said, that, for no cause but her adultery (which might be committed while she still discharged also her duties to her husband), could *she* be rightfully divorced, — leaving entirely out of his contemplation the case of one who refused to conduct as wife to her husband. Martin Bucer, a man of great learning in the Reformed Church, is translated by Milton as follows: "No man who is not very contentious will deny, that the Pharisees asked our Lord, whether it was lawful to put away such a wife as was truly, and according to God's law, to be counted a wife; that is, such a one as would dwell with her husband, and both would and could perform the necessary duties of wedlock tolerably. But she who will not dwell with her husband is not put away by him, but goes of herself; and she who denies to be a meet help, or to be so hath made herself unfit by open misdemeanors, or through incurable impotencies cannot be able, is not by the law of God to be esteemed a wife; as hath been shown both from the first institution, and other places of Scripture. Neither certainly would the Pharisees propound a question concerning such an unconjugal wife; for their depravation of the law had brought them to that pass, as to think a man had a right to put away his wife for any cause, though never so slight. Since, therefore, it is manifest, that Christ answered the Pharisees concerning a fit and meet wife according to the law of God, whom he forbade to divorce for any cause but fornication; who sees not that it is a wickedness so to wrest and extend that answer of his, as if it forbade to divorce her who hath already forsaken, or hath lost the place and dignity of a wife by deserved infamy, or hath undertaken to be that which she hath not natural ability to be?" 3 Milton's Prose Works, 310. These views, it is perceived, are all on one side of the question. They are purposely so; because the other side is sufficiently represented every day among us. And I have selected them from a mass of matter tending to the same conclusion, not to argue the question, or, as I have said, to intimate an opinion of my own upon it; but merely to show those who captiously declaim against all legislation authorizing divorce for causes other than adultery, as being a blow aimed at Christianity itself, that, whoever is right, there is still another view, and other people have religious scruples as well as they. "Who," says Milton, "shall answer for the perishing of all those souls, perishing by *stubborn expositions of peculiar and inferior precepts*,

equitable interpretation of the New Testament; and, though they do not favor divorce from whim or caprice, they deem some causes other than adultery to be allowable.

§ 26. **Desertion, continued.** — Indeed, it is not generally, though sometimes, questioned among Protestants, that dissolutions of the marriage for absolute and total desertion are expressly sanctioned in the New Testament.[1] The Scotch statute, authorizing divorce for desertion, professed in its preamble to be declaratory of the law as it always had been held since the Reformation; and, though there is doubt whether this view of the previous law is correct, still, beyond doubt, the statute is expressive of the religious opinion always prevalent in Protestant Scotland.[2]

against the general and supreme rule of charity." 3 Prose Works, 212.

[1] 1 Cor. vii. 15. See the commentaries of Scott and others on this text. President Dwight, of Yale College, A. D. 1816, preached a sermon before the "executive, and a great part of the legislative, of the State" of Connecticut, a State always liberal in granting divorces, in which he took strong ground against all dissolutions of marriage, except for adultery. But he admitted, that "several respectable commentators, and among them Poole, Doddridge, and Macknight," consider divorce for desertion justified by the text in Corinthians above cited. On a general view of the legislative and judicial practice of Connecticut in respect to divorce, he says: "At this time, the progress of this evil is alarming and terrible. In this town [New Haven], within five years, more than fifty divorces have been granted; at an average calculation, more than four hundred in the whole State during this period; that is, one out of every hundred married pairs. What a plain proof is here of the baleful influence of this corruption on a people otherwise remarkably distinguished for their intelligence, morals, and religion! Happily, a strenuous opposition is beginning to this anti-scriptural law, which it may be fairly hoped will soon terminate in its final revocation." 1 Dwight's Theology, 37; 3 ib. 425, 433. This hope of the learned divine has, however, never been realized; and in Connecticut divorces have continued to be granted by the courts, for several causes prescribed by statute, and, where the statute has appeared inadequate to meet the equity of a meritorious case, the legislature has dissolved the marriage by special act; till, at last, the general jurisdiction spoken of in a subsequent chapter (post, § 827 et seq.), to grant divorces very much in the discretion of the judges, has been conferred on the courts. The divorces have all been from the bond of matrimony (Starr *v.* Pease, 8 Conn. 541), except only a single legislative one, which, under the special circumstances of the case, was from bed and board; a "precedent," says Judge Swift, "not to be imitated." 1 Swift's System, 193. Notwithstanding this liberty of divorce, or in consequence of it, there is no State in the Union in which domestic felicity and purity, unblemished morals, and matrimonial concord and virtue, more abound than in Connecticut, which is justly termed "the land of steady habits."

[2] 1 Fras. Dom. Rel. 654, 655, 677, et. seq.; Shelford Mar. & Div. 368; Brewster Encyc. art. Divorce.

§ 27. **Marriage Indissoluble — Roman Church.** — In the struggles between truth and error, between light and darkness, between the unattainable wished for and the practical realized, between the prophetic good and the actual evil, — the minds of men sway often from extreme to extreme, in the tempest of this life of aspiration on the one hand, and of earthly substance on the other. It is not strange, therefore, that the Roman Church, looking over the condition of man as concerns his matrimonial relations, should have greatly desired, for his good, to promote in him the unattainable wished for, in contrast with what she had seen of the practical in heathen countries. And it is not surprising, that she should have forgotten how impossible it is for an iron outward rule to control the inward. Let us not, then, seeking for the middle course of light and truth, repeat, even in our own inner minds, the harsh charge often brought against her by Protestants, of having fettered divorce in order to fill her coffers by undoing the marriage band for the rich, who would pay her largely of their money.

§ 28. **Continued — Dispensations of the Pope — Matrimonial Impediments.** — It is true indeed, that, though the church made marriage indissoluble, she did permit the Pope, as God's vicegerent on earth, to loose, when his Holiness saw proper, the matrimonial tie; and that so she obtained revenue. But on the other hand also, she permitted the courts of ecclesiastical jurisdiction to pronounce marriages null, on account of impediments created by her to an extent quite ridiculous on any other theory than that of their having been brought into existence for this very purpose. And when, as in subsequent pages we shall see, a mere confession of the impediment served to establish it in court, no great complaint could arise in the minds of unscrupulous laymen, that the church imposed on them too heavy a burden of matrimonial law. But even this facility, given by the church to persons desirous of freeing themselves from unpleasant matrimonial connections, shows only how, in fact, the unrest of her iron rule of indissolubility operated in the minds of ecclesiastics; it is a testimony, awkward indeed, to the injustice of the rule.

§ 29. **Continued — Divorce from Bed and Board — Restitution of**

Conjugal Rights by Suit. — Another testimony of the same kind exists in the liberty she gave of what is called divorce from bed and board. This proceeding, having, at least, no direct authority in Scripture; characterized by Lord Stowell as casting out the parties "in the undefined and dangerous characters of a wife without a husband, and a husband without a wife;"[1] by Judge Swift, as "placing them in a situation where there is an irresistible temptation to the commission of adultery, unless they possess more frigidity or more virtue than usually falls to the share of human beings;"[2] by Mr. Bancroft, as "punishing the innocent more than the guilty;"[3] by a late English writer, as "a sort of insult, rather than satisfaction, to any man of ordinary feelings and understanding,"[4] — may be deemed the most corrupting device ever imposed by serious natures on a blind and pliant community.[5] It could never have been tolerated had not the idea entered men's minds as a part of their religion, that marriage could not be dissolved without committing an offence against God; from which point the slope was easy toward any compromise with good sense; and, as the fruit of compromise, we have this ill-begotten monster of divorce *a mensâ et thoro*, made up of pious doctrine and worldly stupidity. The Protestant Bishop Cozens long ago remarked to a Protestant English nation, — stretching here the point against Catholics to meet fully all Protestant prejudices: "The distinction between bed and board and the bond is new, never mentioned in the Scripture, and unknown to the ancient church; devised only by the canonists and schoolmen in the Latin Church (for the Greek Church knows it not) to serve the Pope's turn the better, till he got it established in the Council of Trent; at which time, and never before, he laid his anathema upon all them that were of another mind; forbidding all men to marry, and not to make any use of Christ's concession."[6] Yet in the face, not only of this testi-

[1] Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 349.

[2] 1 Swift's System, 193.

[3] Bancroft Hist. U. S. 465.

[4] Macqueen Hus. & Wife, 197.

[5] And see the very sound remarks of Chancellor Kent, in Barrere *v.* Barrere, 4 Johns. Ch. 187, 191. This learned judge elsewhere observes, that "these qualified divorces are regarded as rather hazardous to the morals of the parties." 2 Kent Com. 127. And see post, § 37.

[6] In the Duke of Norfolk's Case, 13 Howell St. Tr. 1334.

mony, but of the testimony also of every other man who is not swayed in his opinion by some matter of pure religious belief, Protestant England, and more than half of the states of this country where the tenets of no particular religious sect pervade our legislation, this divorce from bed and board, this nuisance in the law, is suffered to stand unquestioned! Even in Scotland it exists; in almost every place where Marriage is known, this Folly walks with her — the queen and the slut, the pure and the foul, the bright and the dark, dwell together! Such is marriage and its detestable part, such is human life! And over England, but not over this country, walks still that other spawn of a dark age, whose mission it was to keep unconjugal sinners in the strait performance of holy matrimonial duties, termed the suit for the restitution of conjugal rights;[1] whereby one who, without excuse satisfactory to the judge, voluntarily did what the judge was in the habit of compelling others to do, — namely, forsook the bed and board, — was by his judgeship, through the process of the court, thrust back again to the bliss which had been too lightly prized.

§ 30. **Effect of the Reformation on Divorce Law.** — Thus the Reformation, in England, left the ecclesiastical law, as it stood in the earlier times, in full control of this question of divorce. By this law, marriage, as we have seen, was indissoluble; but separations, or divorces, *a mensâ et thoro* were allowed, and the suit for the restitution of conjugal rights cured the evil of desertion. The Reformation wrought, indeed, as we have also seen,[2] a change in Scotland; and a greater change was contemplated for England. "A commission was issued by Henry VIII., and renewed by his son, Edward VI., authorizing Archbishop Cranmer and other leading ecclesiastics to inquire into this subject," including a general revision of the ecclesiastical code, "and report to the Crown the result of their deliberations. These commissioners embodied their opinions and suggestions in the form of a work, which was subsequently published, under the title of *Reformatio Legum Ecclesiasticarum*. Had their proposed emendations been adopted, the

[1] Logan *v.* Logan, 2 B. Monr. 142. Barlee, 1 Add. Ec. 301. See also 50 Lond. Law Mag. 275. For a practical illustration of the effect of this suit in England, see Barlee *v.*

[2] Ante, § 26.

quality of indissolubility would no longer have attached to the matrimonial contract; for they advised, that, in cases of adultery, malicious desertion, long absence, or capital enmities, the marriage should be dissolved, with liberty to the injured party to marry again. They also recommended, that the remedy of divorce *a mensâ et thoro* should be entirely abrogated and done away with." But the changes thus proposed failed to be adopted, in consequence of a series of disasters, the principal one of which was the death of the king, not from any want of confidence in their utility.[1] Yet late statutes, to be noticed more at large in subsequent pages of these volumes, have permitted to a limited extent, in England, judicial divorces dissolving the marriage, since 1858.

§ 31. **Divorce in United States — Restitution of Conjugal Rights, continued.** — We shall see, in the proper place, that the matrimonial law of England is the common law of this country; except that, as we have no matrimonial courts, legislation is necessary before it can be practically enforced. Therefore no cause of divorce is ordinarily allowed with us unless specifically mentioned in some statute. And the legislation of our States has been quite various. The suit for the restitution of conjugal rights has, as already observed, not been used in any of the States;[2] and, in most of them, judicial divorces from the bond of matrimony are permitted for adultery; and, in many of them, for a considerable number of other causes.

§ 32. **How it should be in our States.** — In all our States, men are at liberty to worship God in any way indicated by their own convictions. In none, is the burden placed upon people of supporting a form of religion not approved by them. Therefore the tenets of a sect, whether it be the Roman Catholic Church, the English, or any church of dissenters, cannot

[1] Macqueen Parl. Pract. 467; 2 Burn Ec. Law, Phillim. ed. 503. For a fuller sketch of the provisions of this work, see 4 Reeves Hist. Eng. Law, 543 et seq.

[2] See Cruger *v.* Douglas, 4 Edw. Ch. 433, 506; Coverdill *v.* Coverdill, 3 Harring. Del. 13. See also Rhame *v.* Rhame, 1 McCord Ch. 197, where the question was raised for South Carolina, but not absolutely decided. This jurisdiction has nowhere been conferred by statute.

properly be put forward to govern this legislative question of divorce, in any of our States. If the voice of Christendom were distinct and united on this subject, as it is on the subject of a man's having more wives than one at the same time, that voice would undoubtedly be followed by every legislative assembly. Yet we have seen, that different religious men and bodies of men have their different views of the Scripture teaching; therefore, as it is impossible to harmonize the conflicting religious views by legislation, the legislatures of this country must act upon this subject in respect solely of its political and social bearings. And if they establish laws permitting divorce, they do not thereby injure, even in the inmost conscience, those who deem marriage a religious sacrament, and indissoluble. Such persons are under no compulsion to use the divorce laws, by appearing as plaintiffs in divorce suits; and, if they are made defendants, having violated their matrimonial duties civilly, they cannot complain of being cut off from their matrimonial rights civilly; while still permitted to retain the seal of the sacrament pure and undefiled in their consciences, and not compelled to marry again.

§ 33. **Continued.** — Looking, then, at this legislative question, we are led into the following course of observation: Matrimony is a natural right; and, being such, it can be forfeited only by some wrongful act.[1] Therefore the government is under obligation to permit every person of mature years to be the husband or wife of another, who will substantially perform the duties required in the matrimonial relation; and, when the relation is in good faith entered into, and one of the parties, without the other's fault, so far fails in those duties as practically to frustrate its ends, the government should provide some means whereby, the failure being judicially established and shown to be permanent, the innocent party may be freed from the matrimonial tie, and left at liberty to form another alliance.[2] The guilty party, in such a case, would have no claim to be protected in a second marriage; and whether he should be permitted to marry, or not, is a

[1] See also post, § 363, 392.

[2] See Taylor's Elements of the Civil Law, 351.

question, not of right with him, but of public expediency, upon which there is a considerable diversity of opinion.

§ 34. **Continued.** — Another proposition, corresponding to the foregoing, is the following: Every state has an interest alike in the private morals, the public happiness, the general virtue, and the legitimate increase, of the community. Therefore a sound policy concurs with private right, in demanding the dissolution of marriages which have failed to accomplish substantially the ends for which they were created. By their dissolution, the state obtains the benefit of the fruits of such new alliances as the parties may choose to enter into, with the advantage of having the children trained under those better influences which harmony and matrimonial concord in the parents produce. This principle applies both to desertion and other like offences, which, whether the divorce were allowed or not, would lead to the relinquishment of cohabitation; and to some other matrimonial difficulties, where the cohabitation would be continued, but with great discomfort and irritation. For children born during a discordant cohabitation have their natures tainted by it; while their education, in which also the state has the highest interest, will almost certainly not be of a salutary character.

§ 35. **Continued.** — Greater freedom of divorce than is thus indicated is sometimes claimed; but to go so far seems plainly to be the dictate of natural justice, on the one hand, and of public policy, on the other. At the same time, the stability of the marriage relation should not be lost sight of.[1] "It is the policy of the law," a learned judge has well remarked, "and necessary to the purity and usefulness of the institution of marriage, that those who enter into it should regard it as a relation permanent as their own lives; its duration not depending upon the whim or caprice of either, and only to be dissolved when the improper conduct of one of the parties (the other discharging the duties with fidelity as far as practicable under the circumstances) shall render the connection wholly intolerable, or inconsistent with the happiness or safety of the other."[2]

[1] 2 Kent Com. 102.

[2] Simpson, J., in Griffin *v.* Griffin, 8 B. Monr. 120. See also Whittington *v.* Whittington, 2 Dev. & Bat. 64.

§ 36. **Continued.** — Judge Swift has well observed: "The rendering of the contract of marriage indissoluble is running into the opposite extreme from that of permitting divorces at the pleasure of the parties. There are many persons, who, on the idea that the marriage contract cannot be vacated for any misconduct, will not behave with the propriety they would if the continuance of the contract were dependent on their exertions to render themselves agreeable to the persons with whom they are connected. It is a great hardship that a person, who has been unfortunate in forming a matrimonial connection, must be for ever precluded from any possibility of extricating himself from such a misfortune, and be shut out from enjoying the best pleasures of life. This consideration, instead of adding to the happiness of the connection, must frighten persons from entering into it. It is therefore the best policy to admit a dissolution of the contract when it is evident, that the parties cannot derive from it the benefits for which it was instituted; and when, instead of being a source of the highest pleasure and most enduring felicity, it becomes the source of the deepest woe and misery." [1]

§ 37. **Continued — Adultery a Crime.** — The true principle of legislation, therefore, indefinite indeed, yet leading practically to some definite results, seems to be, that any conduct which renders cohabitation impracticable, and consequently justifies a separation, should be made sufficient cause to dissolve the marriage. This would leave no scope for divorces from bed and board, and it should leave none.[2] Legislation can never destroy the sexual passion, though, aided by religious and moral teaching, it may somewhat restrain and direct the course of its manifestations. Hence that legislation which does most to promote actual matrimony, does also most for the morals of the community; because "honest liberty is the greatest foe to dishonest license." When parties are married in law, yet not in fact, and therefore are forbidden to enter into real marriages, they will be liable, unless they are better — not worse — than the community generally, to commit breaches of the rules of morality, either by promiscuous indulgences, or by forming alliances in the similitude of matrimonial, from which

[1] 1 Swift's System, 191.

[2] Ante, § 29, 30.

a spurious issue may spring. Indeed it is well known, that, in England, where divorces from the bond of matrimony have till lately been obtainable only on application to Parliament, in rare instances, and at an enormous expense, rendering them a luxury quite beyond the reach of the mass of the people, second marriages without divorce, and adulteries, and the birth of illegitimate children, are of every-day occurrence; while the crime of polygamy is winked at, though a felony on the statute-book. Laws punishing adultery, except as an ecclesiastical offence, are there unknown;[1] and they are so generally in those American States in which divorces are not allowed, or allowed but for a single cause.

§ 38. **Continued — South Carolina.** — Perhaps this point cannot better be illustrated than by referring to South Carolina, the only State in the Union in which no divorce, legislative or judicial,[2] has ever, for any cause, been granted. Not only is adultery not indictable there, but the legislature has found it necessary to regulate, by statute, how large a proportion a married man may give of his property to his concubine,[3] — a fact well sustaining the proposition, that, where divorces are not allowed, meretricious connections will be formed; for legislation is never resorted to, except where there exists the subject-matter for it to operate upon. The truth is, — and experience and reason alike show it, — that either divorces or illicit connections will prevail in every community, and it is for the legislature to choose between the two. And the public sentiment will justify what the passions, or the natures, whichever we may call them, of those who have entered into the unhappy marriages practically dissolved may demand. Even from the judicial bench of South Carolina, we have the following remarkable words, fully sustaining this proposition: "In this country," said the judge, and we may imagine how grave he looked when he uttered the words, "where divorces are not allowed for any cause whatever, we sometimes see men of excellent characters unfortunate in their marriages, and virtu-

[1] Anciently in England adultery might be inquired into in tourns and leets, and punished by fine and imprisonment. Shelford Mar. & Div. 386; 3 Inst. 206; Ayl. Parer. 52.

[2] Post, § 42.

[3] See Denton *v.* English, 3 Brev. 147; Canady *v.* George, 6 Rich. Eq. 103; Cusack *v.* White, 2 Mill, 279.

ous women abandoned or driven away houseless by their husbands, *who would be doomed to celibacy and solitude if they did not form connections which the law does not allow, and who make excellent husbands and virtuous wives still.* Yet they are considered as living in adultery, because a rigorous and unyielding law, from motives of policy alone, has ordained it so."[1] It may be unfortunate that men cannot make their theories of legislation harmonize with their better instincts, or their poorer instincts harmonize with their better theories; but, where judges can employ from the bench such language as is here quoted, legislation may not unprofitably leave off theorizing, and adapt itself to the actual condition in which it finds the community, giving redress for wrongs suffered, instead of withholding the redress, "because," says the theory, "the wrong and the redress belong together; therefore, if the redress is not permitted to come, the wrong must stay away."

§ 39. **Evils of Divorce from Bed and Board, continued.** — This law which forbids all divorce is not perhaps, in its result, much worse than the law under which divorces are granted only from bed and board. The evils of such divorces — for in South Carolina not even these are permitted, though there is there a practice of allowing alimony without divorce — are too numerous to be dwelt upon separately. What is mentioned in the foregoing sections is but a specimen of all. The simple statement of the law itself is sufficient to satisfy any mind, not already perverted by false notions instilled into it in its hours of freedom from thought, that this law can be only evil in its influence, and evil continually. A man and woman, one of whom has conducted ill and the other well in the matrimonial relation, are left by this divorce under all the burdens of marriage, yet forbidden to marry; and only permitted, if *both* choose, to come together and form anew the relation of hate, already proved to be without the continuing element of love. And why is the innocent party thus burdened? Because somebody thinks — but let us not undertake to give reasons for what has no reason. If marriage is good for one innocent person, surely it is good for another. If marriage has a charm to hold back from vice one mind inclined to err, surely the

[1] Nott, J., in Cusack *v.* White, 2 Mill, 279, 292.

interests of the community and private morals alike demand, that every willing and erring person be brought under this charm. And if there are reasons of a physical, of a moral, of a mental nature, existing in the particular physical and mental constitutions of particular persons, why the well-being of those individuals can be secured only in marriage, let us still have a uniform rule, and deny marriage either to all of those persons or to none. No man in his sober senses can say, that marriage is not denied to the person who is, without his fault, legally separated, but not divorced, from a former matrimonial partner.

§ 40. **Causes which should authorize Divorce, enumerated.** — What are the specific causes, which, within the foregoing principles, should be made by law sufficient for dissolving the marriage, may be a question, to some extent, of difficulty. Clearly, adultery; desertion, which practically breaks up the relation, and is by many considered to be a greater offence against the marriage than even adultery;[1] extreme cruelty, which renders cohabitation physically unsafe; perpetual, perhaps temporary, imprisonment for crime; drunkenness, when it is confirmed, habitual, and beastly, — are completely destructive of the ends of marriage, therefore they should severally be made causes for its legal dissolution. Beyond this line, we come to ground uncertain and shadowy. There are smothered hatred, love turned to the reverse, jealousies which no reason can allay, an undefinable jarring of natures coming into collision, and other purely mental causes, which render the marriage burdensome, and destroy its higher and holier purposes. But these things are of a subtle nature, and human tribunals cannot well deal with them; while the judgment of the present age has been wisely pronounced against allowing parties to divorce themselves at pleasure, since the public and the children have interests in every marriage, as well as the parties, and since this restraint is necessary to protect the weaker party.

§ 41. **Views which are too loose.** — The policy thus recommended, being substantially what is pursued in the greater

[1] Brower de Jure Connub. 2, 12, 18; Boehmer 4, 19, 30; 1 Fras. Dom. Rel. 677.

part of the States of this Union, is in marked contrast to the views of Milton, and others of the same school. They contend for the right of married persons to be their own sole judges of the causes for which divorce should be allowed them; and Milton would put the power, from which there should be no appeal, into the hands of the husband alone, as in the days of Abraham and Moses. They contend, moreover, that full effect be given to those imponderable mental causes, which, however just of themselves, cannot practically prevail, because no human scale can weigh them. There is indeed much force and sincerity[1] in the argument in favor of this view; but modern legislators will pause long before adopting it. They will at least demand, that, before any divorce is granted, some inquiry be instituted to determine whether the interests of the public, and of other individuals than the parties themselves, especially of children, will be promoted or prejudiced by the dissolution of a union which the highest policy requires, as a general rule, to be perpetual.

§ 42. **Erroneous Views in Legal Literature — Why.** — Deriving, as we do, all our common law of divorce originally from Roman ecclesiastics, who held to the indissolubility of marriage as a point of religious belief, it is not strange that much of our legal literature upon this subject has the hue which such a belief imparts. Our judges and lawyers have frequently, with little consideration, lavished praise on that legislative policy which has withheld all adequate redress for matrimonial wrongs. Thus, as before mentioned,[2] South Carolina has steadily refused, from the first, either to grant a single legislative divorce, or to vest the authority in her courts;[3] and

[1] It has been unjustly attempted to weaken the force of Milton's reasoning by the suggestion, that he was pleading his own cause. The fact is, that, though his attention might have been at first directed to the subject by his own case, yet his argument is a singular instance of self-sacrifice to what he deemed, however erroneously, to be the demands of truth. His wife deserted him; and it would appear that he could easily have persuaded the English Church and Parliament to adopt desertion as a ground of divorce. See ante, § 30. But in his writings on the subject he says scarcely any thing of this cause; while he labors to persuade his readers of other views, which he no doubt foresaw would not find place in the legislation of his country soon enough to serve him personally, whatever hope he might have indulged of their ultimate prevalence.

[2] Ante, § 38.

[3] Hull *v.* Hull, 2 Strob. Eq. 174; Verginer *v.* Kirk, 2 Des. 640, note;

from the bench of the Supreme Court of Georgia comes the following laudation: "In South Carolina, *to her unfading honor*, a divorce has not been granted since the Revolution."[1] Yet even the legal reports of South Carolina bear witness, that there, as in every other State or country, occasion exists for the exercise of this remedy. For example, a man took his negro slave-woman to his bed and table, and compelled the unoffending wife to receive the crumbs after her, with all manner of abuse besides;[2] but we are told, that, to her "unfading honor," the powers of the State refuse to sever this living body from this putrid carcass. If the refusal had been to permit a creditor to collect a sum of money equal to the marriage fee, we should have had no such praise of the policy.

§ 43. **Continued.** — That the judges of this State should themselves praise the legislation of the State is no more than we ought to expect; since all men esteem what is their own more highly than what is another's. Thus it is remarked by O'Neal, J.: "The most distressing cases, justifying divorce even upon scriptural grounds, have been again and again presented to the legislature, and they have uniformly refused to annul the marriage tie. They have nobly adhered to the injunction, 'Those whom God has joined together, let not man put asunder.' The working of this stern policy [of "nobly" refusing redress even in the "most distressing cases," where "Scripture" joins with reason in crying for the redress] has been to the good of the people and the State in every respect."[3] And another of her judges exclaims, — "The policy of this State has ever been against divorces. *It is one of her boasts* that no divorce has ever been granted in South Carolina."[4] Could South Carolina truly declare, that no husband within her borders had ever proved unfaithful to the marriage vow, and no wife had been false to her husband; that the observation judicially made by one of her own judges concerning marriages in this State is in no part true, namely, "All marriages, almost, are entered into on one of two consid-

Mattison *v.* Mattison, 1 Strob. Eq. 387, 388; McCarty *v.* McCarty, 2 Strob. 6.

[1] Head *v.* Head, 2 Kelly, 191; Nisbet, J.

[2] Jelineau *v.* Jelineau, 2 Des. 45.

[3] McCarty *v.* McCarty, 2 Strob. 6, 11.

[4] Durgan, Ch., in Hair *v.* Hair, 10 Rich. Eq. 163, 174.

erations, love or interest, and *the court is induced to believe the latter is the foundation of most of them;*"[1] that no judge of hers had from the judicial bench proclaimed it a virtue to commit the legal felony of polygamy, and to live in adultery; that no class of men existed in the State calling for legislation to regulate their connections with their concubines, — then, indeed, might the people of the other States talk of "unfading honor," which had settled, as a halo, or as a crown of glory, about her brow!

§ 44. **Fears of the Effect of granting Divorces.** — There is a class of opinion on this subject, deserving of great respect, while yet the opinion is erroneous. Many persons suppose, that, if divorce is freely allowed, men and women will rush heedlessly into marriage, and be heedless of their conduct afterward. And they cite what they deem to be the example of France, and the results of the example, where at one time the liberty of divorce was greatly extended. Enormous numbers of couples were made free of the matrimonial tie; *and there the history recited by these objectors ends.* Why do not the objectors advocate the establishment of monarchy in the United States, on the ground, that, in France, the experiment of self-government has not worked well? But why were so many divorces sought? Did the corruption begin with the divorce law? If the granting of the divorces was itself corruption, whence came the prompting? The truth is, France had for so many centuries been under the Roman Catholic rule of indissolubility that social and matrimonial impurity had swollen to such a degree as at last to burst all bounds, and overflow the country.

§ 45. **Progress of Better Views.** — Those who suppose marriage to consist only in a man and woman living in the same house, and lodging in the same room; who suppose the very essence of marriage is the keeping of the same parties together, under all circumstances, of sunshine or of storm; who deem the tender affections, the inward solace of mind, the regard for offspring which watches wisely over it, the restraining and softening influences of home and its loves and its joys, to be

[1] Thompson, J., in Devall *v.* Devall, 4 Des. 79.

no part of marriage, but to be things capable of wandering here and there beyond the dwelling inhabited by those who are called husband and wife, while yet the marriage relation is doing what it ought to do of blessing to the community and the parents and the children, in the midst of hate, of disquiet, of weeping tears of blood, — are permitted, for all the author cares, to turn up their prude faces, and talk of corruption to persons who wish to see the laws minister to something else than this when they minister to marriage; but never will their debasing rule of rusty iron be allowed to restrain the uprising of the better instincts of the people of this country, who, slowly, yet surely; often unwisely, yet true to the end; are bringing marriage, both in law and practice, into the condition which the Maker intended.

§ 46. **Indissolubility absurd.** — The idea, that, according to any just view, whenever parties have come together in marriage, they have thereby placed themselves so far in each other's power for life as to be incapable of freeing themselves by any act of the law, though the ends of their union are all frustrated, though one of them is unwilling to discharge the duties undertaken, though every hope of its ministering to the well-being of the parties is obliterated, — surely can have place only in a perverted understanding. True, indeed, is it, that this union is intended to be for life, that only in the most extreme circumstances should it be dissolved; but the very fact of its sacred nature, too sacred to be made matter of temporary arrangement, is the strong reason why, when it ceases to have any thing worthy to be called sacred about it, when an erring one has trampled it in the mud of his corruption by his polluted feet, the law should cease to call it sacred, and pronounce it profaned and dissolved. The notion of promoting in the community reverence for marriage by holding that to be marriage from which all disgusting things proceed; by receiving as too sacred to be molested the relation which breeds corruption in the souls of the parties, adulteries in the community, unnatural developments of wickedness in the children, sorrow in the hearts of multitudes made by God to be happy, blasphemies in the temple of matrimonial purity; is too preposterous, too absurd, to be reasoned against; too mon-

strous to be credited, as a fact of human legislation, did not testimony not to be rejected prove its existence.

§ 47. **How Courts should regard Divorce Laws.** — But while men may naturally differ concerning the true policy of legislation on this subject, plainly the courts, in administering the law, should construe the statutes in the spirit which prompted their enactment, whatever private opinions the judges may hold of their expediency.[1] And in good faith have the American tribunals generally done this. Occasionally, however, a statute has been frittered away, through the device of an overwrought construction, by judges who have seemed to regard it as a part of their calling to cast every possible obstruction in the path of parties seeking this remedy. But while the attempt thus to correct the errors of legislation is a clear assumption of an office better performed by the legislators themselves, it is incumbent upon the judiciary to guard, in another way, the interests of the public. The courts should see, that the laws are not evaded, and that divorces are granted only to parties entitled to them.

[1] See Bishop Stat. Crimes, § 235.

BOOK II.

THE SOURCES OF AUTHORITY IN OUR MARRIAGE AND DIVORCE LAW.

CHAPTER III.

THE ENGLISH ECCLESIASTICAL LAW.

§ 48. **Our Matrimonial Law of English Origin — How in England — What Court.** — In discussing the subject of marriage and divorce, we are particularly required to form, at the outset, correct opinions concerning the sources and nature of the legal authority which governs in this class of questions. The general doctrine is familiar, that colonists to an uninhabited country take with them to their new locality, as common law, all the laws, written and unwritten, which at the time of their emigration prevailed in the parent land, and which are adapted to their new relations and circumstances.[1] This doctrine, as connected with the subject of these volumes, will pass under examination in our next chapter; we shall in this chapter inquire, — Whence flows the English matrimonial law? or, in other words, — What is authority, on these questions, in England? Until recently, all matrimonial causes were there heard in the ecclesiastical courts. These are regular courts of the country as much as the others; for, though their judges derive their commissions directly from the functionaries of

[1] Bishop First Book, § 49 et seq.

the church, yet indirectly and really they have them from the Crown, because the sovereign of England is the head of the English Church.[1] How the church, first on the continent, and afterward in England, Scotland, and the other divisions of the British islands, obtained, in the gradual and sure advance of her power, jurisdiction over various things relating to the civil rights and interests of men and the welfare of the state, is matter of history not belonging particularly to these pages. Matrimonial causes fell naturally within the circle of her enchantment, because marriage was one of her sacraments;[2] and so less question was always made of the rightfulness of her authority over them than over many others. Consequently this chapter will be mainly occupied with an investigation concerning what is called, in England, the ecclesiastical law.

§ 48*a*. **How the Chapter divided.** — We shall consider, I. The History, Sources, and Nature of the Ecclesiastical Law; II. The Ecclesiastical Law viewed as a Part of the Common Law; III. Books of the Ecclesiastical Law; IV. The Ecclesiastical Judges and Practice, their Decisions, and the New Court.

I. *The History, Sources, and Nature of the Ecclesiastical Law.*

§ 49. **Lay and Civil Jurisdiction formerly in One Court.** — "The Anglo-Saxon common law never recognized the principle of a separate civil or criminal jurisdiction as exercised by the church; though, either out of respect for the sacred character of its members, or from a sense of their superior learning and intelligence, it had certainly admitted the Episcopal order to a participation in the municipal judicature of the country. For, ever since the introduction of Christianity into England, the bishops had sat to hear causes in the county court, in conjunction with the ealderman or his sheriff."[3] And the only difference between the functions of the bishop and the temporal judge appears to have been, that a "superior deference," in the language of Blackstone, "was paid to the bishop's opinion in spiritual matters, and to that of the lay judges in temporal. This union of power," continues the same author, "was very advantageous to them both: the presence of the bishop added

[1] 1 Bl. Com. 278. See also post, § 56.

[2] Coote Ec. Pract. 3; 3 Bl. Com. 92.

[3] Coote Ec. Pract. 4.

weight and reverence to the sheriff's proceedings; and the authority of the sheriff was equally useful to the bishop, by enforcing obedience to his decrees in such refractory offenders as would otherwise have despised the thunder of mere ecclesiastical censure." [1]

§ 50. **Origin of Ecclesiastical Courts — Prohibition from Common-law Courts.** — After the Norman Conquest had brought into the country large numbers of learned foreign ecclesiastics, who succeeded to the episcopal sees of England on the expulsion of the native prelates, the lay and ecclesiastical jurisdictions were separated. The separation was accomplished by a statute of the Norman Parliament, in the reign and through the influence of William I. It recites, that, previous to William's time, the episcopal laws were not administered well, or according to the precepts of the holy canons; and orders, by the advice of the common council, and council of the archbishops, bishops, and abbots, and all the clergymen of the realm, that the same be amended. It then enacts, among other things, that no bishop or archdeacon hold pleas any more in the hundred, concerning the episcopal laws, nor bring to judgment of secular men a cause which appertains to the government of souls; but whosoever shall be impeached according to the episcopal laws, for any cause or fault, shall come to the place which the bishop shall have chosen and named for this purpose, and there answer respecting his cause, and do right to God and his bishop, not according to the hundred, but *according to the canons and episcopal laws;* "*sed secundum canones et Episcopales leges rectum Deo et Episcopo satisfaciat.*" The same statute established the proceeding of prohibition, ever since in use, whereby the temporal courts restrain the spiritual, when attempting to overstep the lawful boundary of their jurisdiction.[2] And though there was a temporary return to the former state of things during the reign of Henry I.,[3] yet substantially this statute of William I. has ever been the foundation of the system of separate ecclesiastical tribunals.

§ 51. **"Canons and Episcopal Laws" — Roman Canon Law.** —

[1] 3 Bl. Com. 61, 62.
[2] Coote Ec. Pract. 5–9, 96.
[3] 3 Bl. Com. 63.

We have seen, that this statute of William I. authorized these newly constituted tribunals to decide all questions within their jurisdiction, *according to the canons and episcopal laws*.[1] But the word canons, in the statute, does not necessarily and exclusively refer to the Roman canons, and the same may be said of the words episcopal laws; but plainly they mean, together, any and all rules which then governed the English Church under the names of canons and of episcopal laws, whether the same were binding elsewhere within the sway of the Roman see or not. And it was said by the ecclesiastical commisioners of George IV.: "In England, the authority of the [Roman] canon law was at all times much restricted, being considered in many points repugnant to the law of England, or incompatible with the jurisdiction of the courts of common law; so much of it as has been received, having obtained by virtual adoption, has been for many centuries accommodated by our own lawyers to the local habits and customs of the country; and the ecclesiastical laws may now be described, in the language of our statutes, as 'laws which the people have taken at their free liberty, by their own consent, to be used among them, and not as laws of any foreign Prince, Potentate, or Prelate.' In addition to these authorities of *foreign origin*, must be enumerated also the *constitutions* passed in this country by the Pope's legates, Otho and Othobon, and the archbishops and bishops of England, assembled in national councils in 1237 and 1269; and a further body of *constitutions* framed in provincial synods, under the authority of successive Archbishops of Canterbury, from Stephen Langton, in 1222, to Archbishop Chicheley, in 1414; and adopted also by the province of York, in the reign of Henry VI. These English constitutions, as they may be termed, have been illustrated by the commentaries of English canonists of distinguished learning and experience, and principally by Lyndwood, an eminent canonist and statesman, much employed in the public affairs of the country in the reigns of Henry V. and VI. These commentaries will be found to contain much valuable information on subjects connected with the history and government of the church. To the foregoing enumeration must be

[1] Ante, § 50.

added also the canons of the English Protestant Church, passed in convocation 1603; and such acts of Parliament as make particular subjects matters of ecclesiastical cognizance, or regulate the course of proceedings with respect to the same."[1] Concerning the canons of 1603, however, it is held, that, not having been ratified by Parliament, though they received the royal assent, they do not *proprio vigore* bind the laity; but they bind the clergy, and the law officers of the ecclesiastical courts.[2]

§ 52. **Roman Canon Law, continued — How as Authority — English Ecclesiastical Law.** — Still some confusion remains in the books, as to the precise weight which the Roman canon law should have in the English ecclesiastical tribunals. Burn says: "The ecclesiastical law of England is composed of these four main ingredients, — the *civil* law, the *canon* law, the *common* law, and the *statute* law. . . . When these laws do interfere and cross each other, the order of preference is this: the *civil* law submitteth to the *canon* law; both of these to the *common* law; and all these to the *statute* law. So that from any one or more of these, without all of them together, or from all of these together without attending to their comparative obligation, it is not possible to exhibit any distinct prospect of the English ecclesiastical constitution."[3] But however accurate this statement might have been at some distant period in our jurisprudence, it is now correct simply as explaining the history of the ecclesiastical law; as when, in speaking of the English language, we enumerate the former tongues of which it is composed. In this aspect, the canon law may be regarded as the Anglo-Saxon of the ecclesiastical.

§ 53. **Continued.** — Among the judges of the ecclesiastical courts, Lord Stowell was perhaps the most inclined to give weight to the Roman canon law. In one case he observed: "Upon the first point, the binding authority of the canon law in *causes matrimonial*, depending in these courts, I look without success for any principle on which I can hold, that they can

[1] Report of Ec. Com. abr. ed. 21, 22.

[2] Middleton *v.* Croft, 2 Stra. 1056, 2 Atk. 650; 1 Burn Ec. Law, Phillim. ed. Pref. 27, 30; Butler *v.* Gastrill, Gilb. Ch. 156; Dakins *v.* Seaman, 9 M. & W. 777, 788.

[3] 1 Burn Ec. Law, Phillim. ed. Pref. 11.

release themselves, by any power of their own, from a submission to that authority. The release, if proper, must come from a higher authority than they possess. It is notorious that this country, at the Reformation, adopted almost the whole of the law of matrimony,[1] together with all its doctrines of the indissolubility, of contracts *per verba de præsenti et per verba de futuro*, of separation *a mensâ et thoro*, and many others; the whole of our matrimonial law is, in matter and form, constructed upon it: some canons of our own may have varied it; and a higher authority, that of the legislature, has swept away some important parts of it. But the doctrine of indissolubility remains in full force." [2] These words of the learned judge, however, must be accepted by us with caution, and with the limitation which restricts their meaning to the particular subject of inquiry then before the court. The same judge, on another occasion, said, that the older canons "can hardly be considered as carrying with them all their *first authority*." [3] And Sir John Nicholl stated the doctrine more distinctly, thus: "If the canon law is to govern the case, the text referred to does not come up to the point; even if it did, *something more would be to be shown*, namely, *that it has been received as the law of this country;* it might not be necessary for this purpose to show a case precisely similar; it would be sufficient to show that it is according to the general rules observed here. But it is a strong, and almost a conclusive, presumption against the present proceeding, that no suit appears ever to have been brought by any but the injured party." [4]

§ 54. **Continued.** — The later case of The Queen *v.* Millis, in the House of Lords, called out from the judges of the common-law courts their views of this matter, stated, by Lord Chief Justice Tindal, who delivered the unanimous opinion of the

[1] Evidently the law which was adopted was the law then prevailing in the ecclesiastical courts of *England;* and other authorities deny, that the Roman canon law ever had force, *proprio vigore*, in those courts, even before the Reformation.

[2] Proctor *v.* Proctor, 2 Hag. Con. 292, 300, 301. See also Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 81, 82, 4 Eng. Ec. 485, 497; Macqueen Parl. Pract. 446.

[3] Burgess *v.* Burgess, 1 Hag. Con. 384, 393.

[4] Norton *v.* Seton, 3 Phillim. 147, 163, 1 Eng. Ec. 384, 388.

twelve judges, in the following words: "My lords, I proceed in the last place to endeavor to show, that the law by which the spiritual courts of this kingdom have from the earliest time been governed and regulated, is not the general canon law of *Europe*, imported as a body of law into this kingdom, and governing those courts *proprio vigore;* but, instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical constitutions of our archbishops and bishops, and by the legislature of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical Law. . . . That the canon law of *Europe* does not and never did, as a body of laws, form part of the law of *England*, has been long settled as established law. Lord Hale defines the extent to which it is limited very accurately. 'The rule,' he says, 'by which they proceed is the canon law, but not in its full latitude, and only so far as it stands uncorrected either by contrary acts of Parliament or the common law and custom of *England;* for there are divers canons made in ancient times, and decretals of the popes, that never were admitted here in *England*.'[1] Indeed, the authorities are so numerous, and at the same time so express, that it is not by the Roman canon law that our judges in the spiritual courts decide questions within their jurisdiction, but by the king's ecclesiastical law, that it is sufficient to refer to two as an example of the rest. In Caudrey's Case,[2] which is entitled 'Of the King's Ecclesiastical Law,' in reporting the third resolution of the judges, Lord Coke says, 'As in temporal causes the king, by the mouth of the judges of his courts of justice, doth judge and determine the same by the temporal laws of England, so in cases ecclesiastical and spiritual, as namely' (amongst others enumerated), 'rights of matrimony, the same are to be determined and decided by ecclesiastical judges according to the king's ecclesiastical law of this realm;' and a little further he adds, 'So, albeit the kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved, and allowed here, by

[1] Hale Hist. Com. Law, c. 2.

[2] Caudrey's Case, 5 Co. 1.

and with a general consent, are aptly and rightly called, The King's Ecclesiastical Laws of England.' In the next place, Sir John Davies, in *Le Case de Commendams*,[1] shows how the canon law was first introduced into England, and fixes the time of such introduction about the year 1290, and lays it down thus: 'Those canons which were received, allowed, and used in *England*, were made by such allowance and usage part of the king's ecclesiastical laws of *England;* whereby the interpretation, dispensation, or execution of those canons, having become laws of *England*, belong solely to the king of *England* and his magistrates within his dominions:' and he adds, 'Yet all the ecclesiastical laws of *England* were not derived and adopted from the court of *Rome;* for long before the canon law was authorized and published' (which was after the Norman Conquest, as before shown) 'the ancient kings of *England*, namely, Edgar, Ethelstan, Alfred, Edward the Confessor, and others, did, with the advice of their clergy within the realm, make divers ordinances for the government of the church of England; and after the Conquest divers provincial synods were held, and many constitutions were made, in both the kingdoms of England and Ireland; all which are part of our ecclesiastical laws of this day.'"[2] Although the lords did not all concur with the judges in the main point of this case, about which, as we shall see hereafter, there is a conflict of opinion, still, on this matter of the king's ecclesiastical law, there appears to be no disagreement. The same conclusion is arrived at, as to the consistorial, or ecclesiastical, law of Scotland.[3]

§ 55. **How far Canon Law Meritorious — Its Weight in Matrimonial Causes.**— Having thus seen to what extent the Roman canon law is incorporated into the ecclesiastical law of England, we are not strictly required, in the further prosecution of our subject, to enter into any examination of the question whether it is a wise system or not. Undoubtedly the jurist whom leisure and unfailing years should permit to become thoroughly accomplished in all legal learning, having traversed and

[1] Sir J. Dav. 69 *b*, 70–72 *b*.

[2] Reg. *v.* Millis, 10 Cl. & F. 534, 678, 680–682.

[3] 1 Fras. Dom. Rel. 20–39.

minutely explored the rugged and wealthy fields of the common law, and passed among the foliage, flowers, and evening twilight melodies of the civil, would turn his steps into the winding ways, among the venerable cloisters, of the canon law. By some, this canon law is deemed a mere patchwork of absurd things on many beautiful things of equity, borrowed from the civil law. Lord Stowell, on the other hand, thought it "deeply enough founded in the wisdom of man."[1] But it seems to be agreed, that, while "the commentators upon it became as numerous as those on the Roman law, they far exceeded them in subtilty, false refinement, and idle speculation; and in obscene dissertations the province is peculiarly their own. It has been observed by Blackstone, that some of the impurest books written in any language are those by the canonists, on the subject of marriage and divorce."[2] Still, whatever be the true estimate of the canon law, as a system of jurisprudence, of philosophy, or of religion, it can have no peculiar weight in the questions we are to consider in these volumes, even in cases where all other authorities are silent. Dr. Lushington once observed: "Very little assistance can be obtained from authorities;" that is, books of the canon law; "it may be well to consult Sanchez for minute and ingenious disquisitions on the subject; but I should not be disposed to consider his authority of any very great weight, even if it governed the present question, which I do not think it does. I must rather endeavor to find out what are the true principles of law and reason applicable to the case, following, as far as practicable, or rather not contradicting, former decisions."[3]

II. *The Ecclesiastical Law viewed as a Part of the Common Law.*

§ 56. **Part of Unwritten Law of the Land.** — That the ecclesiastical courts of England are regular tribunals of the country

[1] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 64, 4 Eng. Ec. 485, 489.

[2] 1 Fras. Dom. Rel. 24; 3 Bl. Com. 93.

[3] Deane *v.* Aveling, 1 Robertson, 279, 297. The same view was taken by Sir C. Cresswell, in Hope *v.* Hope, 1 Swab. & T. 94, where he decided a point, not previously drawn into judgment in England, directly contrary to the holding of the Roman canon law.

has already been observed; also, that the law administered in them is a part of the general law of the land.[1] It is not, indeed, technically termed common law, in the limited acceptation of the word; but it is such in fact, the same as is the law administered in the equity and in the admiralty tribunals. In an early case, therefore, it was "resolved, on great debate, that the ecclesiastical law is part of the law of the land;"[2] it is sometimes denominated a branch of the common law;[3] and so it has always been regarded both by the courts and by Parliament.[4]

§ 57. **Continued — Summary of Views.** — The doctrine of the foregoing sections of this chapter may be briefly stated thus: Of the several branches of the common law of England, there is one which is called the ecclesiastical law, the same as there is another which is more technically termed the common law; and still another, which is named the law of the admiralty; and another, of very great importance, known as equity. To the branch of the common law called ecclesiastical, the subject of marriage and divorce, in England, pertains. This branch of the law is one of a peculiar kind; it was clipped from a singular stock, whence it was engrafted into the English tree; there it is, and has long been, fed by the common sap which nourishes the other parts of the English jurisprudence, yet it retains its original qualities, distinguishing it from the rest; and, if we would become wise concerning it, in its present unfoldings, or concerning its fruits, we must give to it a separate and special study.

III. *Books of the Ecclesiastical Law.*

§ 58. **General View — Old Text-Books.** — To what books, then, shall we go for a knowledge of this law? Those most reliable, of course, are the published reports of the decisions of the ecclesiastical courts. In fact, this is the only source fully reliable; for all the old English text-books appear to

[1] Ante, § 48–50.

[2] Prudham *v.* Phillips, 1 Harg. Law Tracts, 456, note.

[3] "The common law of England of which the ecclesiastical law forms a part." Lord Chief Justice Tindal, in Reg *v.* Millis, 10 Cl. & F. 534, 671. See also Catterall *v.* Catterall, 1 Robertson, 580.

[4] 1 Burn Ec. Law, Phillim. ed. Pref. 25.

contain a greater or less admixture of the Roman canon law, without any proper discrimination as to what has been adopted in England. We may, however, mention two of the old text-books now accessible, whose authors Lord Stowell has denominated "the oracles of our own practice, Godolphin and Oughton."[1] The former, written in English, is entitled "*Repertorium Canonicum;* or, an Abridgement of the Ecclesiastical Laws of this Realm, consistent with the Temporal." The third edition of th s work was published in London, A. D. 1687. The same author has left a work, sometimes referred to, called the "Orphan's Legacy," and another on "Admiralty Jurisdiction." Judge Story has quoted him as "a very learned admiralty judge." The latter of the afore-mentioned works of ecclesiastical law, written in Latin and published in two quarto volumes in 1738, is entitled "*Ordo Judiciorum sive Methodus Procedendi in Negotiis et Litibus in Foro Ecclesiastico-Civili Britannico et Hibernico.*"[2] The first part of this work was, in 1831, translated by Law, a provincial ecclesiastical judge, who incorporated with it some portions of the works of Clarke, Conset, Ayliffe, Cockburn, Gibson, and others, entitling the whole "Forms of Ecclesiastical Law, or the Mode of conducting Suits in the Consistory Courts." This translation has gone into a second edition. The translator in his preface promised the second part of Oughton, but it appears not to have been laid before the public. The most of what is valuable both in Godolphin and Oughton has found its way into other and more modern collections.

§ 59. **Old Text-Books, continued.** — There are two other of these old English works, worthy of note; one of which, cited as Ayliffe's Parergon, and published in 1726, is entitled "*Parergon Juris Canonici Anglicani;* or a Commentary by way of Supplement to the Canons and Constitutions of the Church of England, not only from Books of the Canon and Civil Law, but likewise from the Statute and Common Laws of this Realm." This work is convenient for reference, but it contains much

[1] Briggs *v.* Morgan, 3 Phillim. 325, 1 Eng. Ec. 408, 409.

[2] In Chamberlain *v.* Chandler, 3 Mason, 242, 245.

[3] For a somewhat lower estimate of this book, especially of the part which pertains to the law in distinction from the practice, see Hope *v.* Hope, 1 Swab. & T. 94.

which is clearly not English law. It is a folio volume of between five and six hundred pages. The other work, and one of probably more value and authority, is Gibson's "*Codex Juris Ecclesiastici Anglicani;* or, the Statutes, Constitutions, Canons, Rubrics, and Articles of the Church of England, methodically digested under their Proper Heads, with a Commentary, Historical and Juridical." The second edition, enlarged by the author, was published at Oxford, A. D. 1761. It is in two folio volumes, containing together above sixteen hundred pages. Besides these, there are some other old books of less note, which we need not pause to mention.

§ 60. **Later Text Books.** — Of later productions, Burn's Ecclesiastical Law, in four volumes, is familiar to the profession. It is a useful compilation, or digest; for such is substantially its character, it having little claim to be considered an elementary treatise; and it does not attempt any original elucidations of legal doctrine. The ninth edition, greatly enlarged and improved by Phillimore, was published in 1842. We have also Roger's "Practical Arrangement of Ecclesiastical Law," in one volume, — an excellent compilation, following substantially the plan of Burn, of whose work it is a sort of abridgment, and resembling a *nisi prius* treatise. The second edition was published in 1849.

§ 61. **Reports.** — There are no regular reports of decisions in the ecclesiastical courts prior to the year 1809. Then commence the reports of Phillimore, embraced in three volumes, coming down to and including the year 1821. Next we have the reports of Addams, whose two volumes, and 284 pages of an unfinished third volume, carry us into the year 1826. Haggard follows with three volumes, and an unfinished fourth, extending to 1833. Then succeeds Curteis, in three volumes, taking us through the year 1844. He is followed by Robertson, whose one volume and an unfinished second bring us down to 1853. Then we have, in two volumes, the "Ecclesiastical and Admiralty Reports," by Spinks, conducting us to 1855. A single thin volume, the earlier part of which is by Deane, and the later by Deane assisted by Swabey, the whole being cited under the joint names of Deane and Swabey, closes the work of reporting, previous to the establishment of the new

courts for the hearing of testamentary and matrimonial causes, by act of Parliament, in 1857.[1] But, though the regular reports go back no further than 1809, the volumes of these contain, either in notes or otherwise, many earlier cases. And Dr. Phillimore made a collection, in two volumes, of cases decided chiefly between the years 1752 and 1758, with some cases of an earlier date, in the Arches and Prerogative Courts and Court of Delegates, containing the judgments of the Right Hon. Sir George Lee, cited as Lee's Reports. We have also two volumes of immense value, compiled by Dr. Haggard, containing the judgments of Lord Stowell in cases argued and determined in the Consistory Court of London. In the Notes of Cases, in the Jurist, in the Law Journal, and in other like depositories of law, are likewise some decisions not found in the regular series. So there are a few decisions mentioned in the notes to Poynter's essay on Marriage and Divorce, not found elsewhere.

§ 62. **"English Ecclesiastical Reports" — Irish.** — The beforementioned English Reports, down to and including the volumes of Curteis, with the exception of the fourth volume of Haggard, are, together with Fergusson's volume of Scotch Consistorial Reports, somewhat condensed, chiefly by the omission of cases deemed to be unimportant in the United States, and published at Philadelphia, in seven volumes of close type, under the name of the English Ecclesiastical Reports. Perhaps in this connection should be mentioned also Milward's "Reports of Cases argued and determined in the Court of Prerogative in Ireland, and in the Consistory Court of Dublin, during the Time of the late Right Hon. John Radcliff, LL.D."; which are good law in England and the United States. These reports are in one volume, and embrace the period between the years 1816 and 1843.

IV. *The Ecclesiastical Judges and Practice, their Decisions, and the New Court.*

§ 63. **The Judges — How to study their Decisions.** — The English ecclesiastical tribunals have been presided over by some of the ablest legal persons in the kingdom. They are

[1] Post, § 65.

usually the same judges who administer the admiralty law, formerly selected from among the advocates at Doctors' Commons, now passed away, — a position attainable only after many years of laborious study.[1] But they have no experience in the trial of common-law causes; consequently are unaccustomed accurately to distinguish the law by which a case is governed from the evidence by which the facts are sustained. The result is, that, while their opinions are luminous and instructive, the precise point of law upon which a case turns does not always distinctly appear in them. And often we can discern the point only on comparing the case with several others, and drawing a conclusion from the whole. Therefore, in studying their decisions, we are required to bear in mind these things, which indeed are more or less elements to be regarded in all judicial opinions.[2] Dr. Lushington once observed: "Before I comment upon the authorities to which I shall refer, I think it right to premise, that every expression used by the learned judges must be considered with reference to the facts in each case, otherwise the greatest misapprehensions will arise. It seldom happens that a judge lays down any abstract principle of law, without reference to the circumstances of the case he has to decide; to repeat all the facts in each case to prevent misapprehension, would be endless."[3]

§ 64. **Practice of Ecclesiastical Courts — Importance of understanding it.** — A knowledge of the peculiar practice of these courts is also, in many instances, important to an understanding of the precise point involved in a decision, or the precise weight to which it is entitled as an authority. For example, one possessing such knowledge would know, without the aid of a particular observation from the bench, that a judgment upon the admissibility of a pleading, especially if favorable to its admission, and more especially a mere dictum of the judge in debating its admissibility, is less to be regarded than a final

[1] See Report of Ec. Com. abr. ed. 28. These observations apply particularly to the courts held at the metropolis. A very large proportion of the provincial ecclesiastical judicatories are presided over by gentlemen — many of them clergymen — of no particular legal education, but their decisions are not reported.

[2] Bishop First Book, § 452.

[3] Phillips *v.* Phillips, 1 Robertson, 144, 157.

adjudication.[1] And many of the ecclesiastical decisions, both final and interlocutory, establish important principles of general law, pertaining to the subjects under investigation, while still the principles can be evolved or perceived only by a person familiar with the practice of those courts. This consideration goes far to reconcile the author to the necessity, which will be upon him when he comes to discuss the subject of divorce practice in this country, of stating, in brief, the leading features of the practice of the English ecclesiastical tribunals.[2] Though the matrimonial and probate jurisdictions have now departed from them, the reports of their former doings live; and, so far as our practice follows theirs, they, and not the new English judicatories having the care of these subjects in England, are our guide.

§ 65. **New Jurisdiction — Divorce Court — (Late English Statutes, in the Note).** — An act of Parliament, dated August 28, 1857 (20 & 21 Vict. c. 85), has now, as just intimated, deprived the English ecclesiastical courts, from and after its going into operation in the year 1858, of their jurisdiction over matrimonial causes; transferring it to a new court, styled "The Court for Divorce and Matrimonial Causes."[3] Another and

[1] See Durant *v.* Durant, 1 Hag. Ec. 733, 763, 3 Eng. Ec. 310, 324.

[2] Vol. II. § 215 et seq.

[3] 1. We, in this country, have so often occasion to consult the English books, and the decisions of the new Divorce Court have become so numerous, that I deem it desirable to present, in this Note, a brief view of the late English statutory law on this subject.

2. Stat. 20 & 21 Vict. c. 85, mentioned in the text, is in 48 sections. Besides matters of mere detail, it takes from the ecclesiastical courts all jurisdiction "in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights," &c., and empowers the new court to enforce the decrees and orders previously made by the ecclesiastical courts in causes matrimonial. Suits pending it transfers into the new court; and gives to the new court general jurisdiction over the subject. "No decree shall hereafter be made for a divorce *a mensa et thoro;* but, in all cases in which a decree for a divorce *a mensa et thoro* might now be pronounced, the court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce *a mensa et thoro* now has." This language, however, is qualified by that of another section (25) which provides, that, "in every case of a judicial separation, the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead;

earlier act of the same session took away from those tribunals, in like manner, their jurisdiction over testamentary causes,

provided, that, if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate." And this general idea is further expanded in § 26, which speaks of her right to contract, sue and be sued, and the like. The statute provides that a sentence of judicial separation "may be obtained either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards." It retains the suit for the restitution of conjugal rights; and, moreover, it makes provision (as to which it was amended by 21 & 22 Vict. c. 108, and again by 27 & 28 Vict. c. 44) whereby a wife deserted by her husband may have protection as to her property. As to divorces dissolving the bond of marriage, the statute has the following provisions: § 27. "It shall be lawful for any husband to present a petition to the said court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards; and every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded: provided, that for the purposes of this act incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of her majesty or elsewhere. § 28. Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the court, he shall be excused from so doing; and, on every petition presented by a wife for dissolution of marriage, the court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties, or either of them may insist on having the contested matters of fact tried by a jury as hereinafter mentioned. § 29. Upon any such petition for the dissolution of a marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and shall also inquire into any countercharge which may be made against the petitioner. § 30. In case the court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the court shall dismiss the said petition. § 31. In case the court shall be

giving it to a new tribunal; and so we of the United States have little occasion to consult the present doings of the ecclesiastical courts.

satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the court shall pronounce a decree declaring such marriage to be dissolved: provided always, that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery." The statute then makes various provisions respecting alimony, the damages recovered against the *particeps criminis*, and the like. On the question of evidence, its terms are, § 48, "The rules of evidence observed in the superior courts of common law at Westminster shall be applicable to and observed in the trial of all questions of fact in the court." The common law action of *crim. con.* is abolished.

3. Various amendments and additions to the law were subsequently made, but none altering what is set down in the last paragraph. The amendatory acts are the following: —

21 & 22 Vict. c. 93, provides, that persons who are or claim to be natural-born subjects may, by application to the Divorce Court, have determined the question of their legitimacy, or the lawfulness of their own marriage. It is in 11 sections.

21 & 22 Vict. c. 108, in 23 sections, supplies further details respecting the practice of the Divorce Court, and dispositions of the property of the parties.

22 & 23 Vict. c. 61, is of the like sort.

23 & 24 Vict. c. 144, in 8 sections, is also of the like sort. In § 7 it contains a provision of great consequence, constantly before the court in subsequent cases. It is as follows: "Every decree for a divorce shall in the first instance be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall by general or special order from time to time direct; and during that period any person shall be at liberty, in such manner as the court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the court; and, on cause being shown, the court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may require; and, at any time during the progress of the cause, or before the decree is made absolute, any person may give information to her majesty's proctor of any matter material to the due decision of the case, who may thereupon take such steps as the attorney-general may deem necessary or expedient; and, if from any information or otherwise the said proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the attorney-general, and by leave of the court, intervene in the suit, alleging such case of collusion,

§ 65 *a*. **Reports of Divorce Court.** — The regular, authorized Reports of the Divorce Court are — "Reports of Cases decided in the Court of Probate and in the Court for Divorce and Matrimonial Causes," by Swabey and Tristram, beginning with the organization of the court, and extending down to the commencement of the "Law Reports." They are in four volumes, the last being thin. In the Law Reports, Probate and Matrimonial Causes constitute one of the divisions of the Common Law series. Divorce cases are also found in the various well known irregular reports.

CHAPTER IV.

THE COMMON LAW OF MARRIAGE AND DIVORCE IN THE UNITED STATES.

§ 66. **General View.** — Since the publication of the first edition of this work, the author has had occasion to discuss

and retain counsel and subpœna witnesses to prove it; and it shall be lawful for the court to order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property; and, in case the said proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as a part of the expense of his office." This act was, by its terms, to continue only for a limited period; but it was made perpetual by 25 & 26 Vict. c. 81. By 29 Vict. c. 32, § 3, it was provided, that "no decree *nisi* for a divorce shall be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the court shall under the power now vested in it fix a shorter time."

29 Vict. c. 32, besides the above provision, contains regulations regarding alimony and the suit for the restitution of conjugal rights.

30 Vict. c. 11, relates to alimony, but it applies only to Ireland.

31 & 32 Vict. c. 77, amends the regulations concerning appeals from the Divorce Court to the House of Lords.

33 & 34 Vict. c. 110, provides a divorce court for Ireland, and amends the Irish marriage laws.

34 & 35 Vict. c. 49, makes further provisions on the same subject as the last.

elsewhere the nature and origin of our unwritten law.[1] And he does not intend to illustrate at length, in one of his books, what is sufficiently explained in another. But while the doctrines unfolded in his other work, and the statements made in the last chapter, sufficiently show that the law of the ecclesiastical courts relating to marriage and divorce must be a part of our common law, the proposition lies so much in obscurity in the reports as to require a further elucidation of it here. We shall look at it in the light both of principle and of authority.

66 *a*. **How the Chapter Divided.** — In this chapter, therefore, we shall consider, I. The Common Law of the Country as existing independently of the Courts; II. The Doctrine that the Courts are the Offspring of Legislation; III. How as respects Marriage and Divorce Law; IV. How as to the Practice in Matrimonial Causes.

I. *The Common Law of the Country as existing independently of the Courts.*

§ 67. **Colonists bring Law — Conquered Country.** — In the last chapter[2] we adverted to the general rule, that English colonists to an uninhabited country carry with them to their new locality their own English laws, except such as are inapplicable to their altered relations and circumstances.[3] The rule as to emigrants to a conquered country is different; and, though Blackstone considered the American colonies to be of the latter class,[4] his opinion is manifestly erroneous; and both the reason of the thing, and the judicial decisions, English and American, are the other way.[5] This general doctrine, in its applicability to this country, is everywhere recognized by our courts, and, in most of the States, it has been confirmed either in the written constitution, or by legislative enactment.[6]

§ 68. **"All Law" — Matrimonial Law.** — In considering the applicability of this doctrine to any particular English law,

[1] Bishop First Book, § 43–59.
[2] Ante, § 48.
[3] 1 Bl. Com. 107; 1 Kent Com. 343, 473; 1 Story Const. § 147, 148; 1 Burge Col. & For. Laws, preliminary chap. p. 31, 32.
[4] 1 Bl. Com. 107.
[5] 1 Story Const. § 152–157.
[6] Bishop First Book, § 51–59.

the question of what English tribunal administers it in England is in reason wholly immaterial.[1] So the language of the books is general, "*all laws;*"[2] and, though in some of the American cases the term "common law" is used,[3] yet it is so employed in its larger sense, as signifying all law not resting exclusively on express legislative sanction, or the letter of a written constitution. But aside from this view, the courts of England have specifically held, that the matrimonial law of the ecclesiastical tribunals is a branch of the law which colonists take with them.[4] The weight of American decision is to the same effect, but this we shall consider further on.[5]

II. *The Doctrine that the Courts are the Offspring of Legislation.*

§ 69. **Colonists do not take Courts — How the Law before Courts established.** — Equally plain also is the proposition, as one both of fact and of legal doctrine, that colonists do not take with them the courts of the mother country. And from this proposition results another, likewise both of fact and of legal doctrine, that, during the time intervening between the settlement of the colony and the establishment of the courts, the laws must remain practically inoperative.[6] How long a period

[1] Terrett *v.* Taylor, 9 Cranch, 43; Pawlett *v.* Clark, 9 Cranch, 292.

[2] Blankard *v.* Galdy, 2 Salk. 411; Anonymous, 2 P. Wms. 75.

[3] Commonwealth *v.* Knowlton, 2 Mass. 530, 534; Sackett *v.* Sackett, 8 Pick. 309, 316.

[4] Lautour *v.* Teesdale, 8 Taunt. 830; Rex *v.* Brampton, 10 East, 282; Catterall *v.* Catterall, 1 Robertson, 580, 581; ante, § 56.

[5] Post, § 71 et seq.

[6] Some judges have suggested, and in a few instances have partly acted on the idea, that, as observed in an Arkansas case, "in our body politic, if by any means the ordinary tribunal for affording relief be destroyed, some other tribunal must be found to supply its place; which is generally the courts of equity, it being the boast of those tribunals to give relief where others are incompetent." Rose *v.* Rose, 4 Eng. 507, 512. But this is not the doctrine which most prevails in this country; at all events, it is not generally accepted in terms so broad. As a matter of legal principle, if the legislature should establish a system of laws, not mentioning any court in which they were to be enforced, the tribunal best adapted to enforce them ought to take the jurisdiction. See post, § 73. Yet such a result rests on a reason inapplicable to the circumstances mentioned in our text. There is, however, a jurisdiction, assumed by the equity courts in this country, to pronounce a marriage void for fraud, and the like, as we shall see in the proper place (Vol. II. § 291–293, 570), with which jurisdiction we can find little ground of principle to complain, though it is not exercised by the English equity tribunals. Another jurisdiction, taken by the courts of equity in some of our States, but not generally

of this kind of torpidity would be required to exhaust the life of the laws, so that on the organization of courts they would not be admitted as rules of decision, or whether this result would ever come, we know not; only we know, that a longer time would be necessary than has yet elapsed since the settlement of this country. Courts were rarely, if ever, organized here, at once, with power to administer all the laws which the colonists brought with them; for instance, in many of the colonies, even down to the Revolution, there were no tribunals competent to administer equity; and in some of the States, since that time, only limited equity powers have been conferred; yet the body of equity law has only slumbered, it has not died.[1] And though our ancestors might have established, if they had chosen, a tribunal in each colony with jurisdiction to administer all the law existing in the colony, yet in fact they adopted, instead of this, the English system; and the common-law courts and the equity, for instance, were here kept within their respective limited spheres, the same as in England. The consequence is, that in all parts of our country has been witnessed the sight, which to English eyes would appear strange, of some portion of the law lying in repose, ready to be awakened at the call of any tribunal to which the legislature should give jurisdiction over a particular subject embraced by the law.

§ 70. **Law in Repose, continued — Equity — States and United States.** — An illustration of this principle is observable in the fact, that some of the States, as Massachusetts, having no distinct equity tribunals, have given from time to time to their common-law courts jurisdiction over particular subjects of equity; and that, under these circumstances, the entire body of equity law, as administered in tribunals separate from those of the common law in England, attaches to the subject immediately on the jurisdiction being created. And when a common-law court gets a jurisdiction of this sort by reason of the principal subject, it entertains all questions incidental to the principal one, through the entire range of equity.[2] The same

admitted (Vol. II. § 350–363), is to grant alimony without divorce, confessedly not within the power of equity in England.

[1] 1 Story Eq. Jurisp. § 56, 58.

[2] Burditt *v.* Grew, 8 Pick. 108; Pratt *v.* Bacon, 10 Pick. 123; Holland *v.* Cruft, 20 Pick. 321.

general doctrine appears still more plain in the fact, that, in those States where there are no equity tribunals, or only limited ones, the United States courts exercise full equity powers, whenever the citizenship of the parties or any other cause gives them the authority to act at all in the premises. This they could not do, if equity law were not as really a law of those States as if there were State judicatories to administer it;[1] so, at least, the author understands, though there are cases, not necessary to be cited here, from which it would appear that this opinion has not always been an active presence in the minds of the United States judges.

III. *How as respects Marriage and Divorce Law.*

§ 71. **General Doctrine.** — The foregoing course of argument, established at each point by authorities drawn from decisions in causes not matrimonial, conducts us to the true answer to the question, whether the English matrimonial law is binding in marriage and divorce causes in this country. We have no ecclesiastical courts, and we never had them, even in colonial times;[2] therefore no tribunal in this country can take jurisdiction of this class of questions, without the authority of a statute. But when a statute has given the authority, the tribunal is to exercise it according to the law of the land; dormant here, indeed, since the settlement of the country, yet derived by us at the time of its settlement from England, where it was administered in the ecclesiastical courts. This view, though opposed apparently by some cases, which to the casual eye are adverse,[3] is substantially borne out by other and direct adjudications, which may be deemed to have settled the law as thus stated.[4]

[1] Robinson *v.* Campbell, 3 Wheat. 212, 222; United States *v.* Howland, 4 Wheat. 108, 115; Lorman *v.* Clarke, 2 McLean, 568; Gordon *v.* Hobart, 2 Summer, 401, 405; Mayer *v.* Foulkrod, 4 Wash. C. C. 349, 354; Fletcher *v.* Morey, 2 Story, 555.

[2] As to Virginia, see, on this point, Godwin *v.* Lunan, Jefferson, 96.

[3] Parsons *v.* Parsons, 9 N. H. 309. But compare it with Quincy *v.* Quincy, 10 N. H. 272, and other cases, where the English decisions are cited apparently as authority. See also Burtis *v.* Burtis, 1 Hopkins, 557; Perry *v.* Perry, 2 Paige, 501; Ristine *v.* Ristine, 4 Rawle, 460; Olin *v.* Hungerford, 10 Ohio, 268; 2 Dane Ab. 301.

[4] Crump *v.* Morgan, 3 Ire. Eq. 91, 98; Williamson *v.* Williamson, 1 Johns. Ch. 488, 491; Barrere *v.* Barrere, 4 Johns. Ch. 187, 196; Wood *v.* Wood,

§ 72. **Cases reviewed — Impotence.** — Of the cases apparently adverse to this view, that of Burtis *v.* Burtis, decided by Chancellor Sanford, in New York, is an admirable illustration of one of the principles just mentioned; namely, that a jurisdiction must be conferred, directly or indirectly, by statute, before the particular law can be practically administered.[1] The question arose in a proceeding instituted before a court of equity to annul a marriage on the ground of physical impotence in the defendant. At the time the bill was filed, the statute had not been enacted authorizing the courts of equity to grant divorces for impotence; but the plaintiff contended, that the right existed under the laws which our forefathers brought from England, and that the equity court was the proper one to exercise the jurisdiction. The Chancellor, however, decided, that, this being a matrimonial question of which the ecclesiastical tribunals have exclusive cognizance in England, he could not afford the relief, notwithstanding he was authorized to grant divorces for certain other specific causes. But in pronouncing this opinion, he took occasion to assert apparently still broader ground; and to hold, that the statutes of the State authorizing divorces are original provisions, and that no part of the English ecclesiastical law had been adopted in New York.[2] He reviewed the history of divorces in the colony; and showed, that in colonial times none had been granted by the government or its courts, except four in 1670 and 1672, by Governor Lovelace, who, either alone or in conjunction with his council, seems to have exercised all magistracy, executive, legislative, and judicial; that, by the constitution of 1777, such

2 Paige, 108; Burr *v.* Burr, 10 Paige, 20, 35; Johnston *v.* Johnston, 14 Wend. 637, 642; North *v.* North, 1 Barb. Ch. 241; Head *v.* Head, 2 Kelly, 191; Lovett *v.* Lovett, 11 Ala. 763; Moyler *v.* Moyler, 11 Ala. 620; Jeans *v.* Jeans, 2 Harring. Del. 38; Almond *v.* Almond, 4 Rand. 662; Thornberry *v.* Thornberry, 2 J. J. Mar. 322; Devanbagh *v.* Devanbagh, 5 Paige, 554, 556; McGee *v.* McGee, 10 Ga. 477; Wright *v.* Wright, 6 Texas, 3, 21; Nogees *v.* Nogees, 7 Texas, 538; Bauman *v.* Bauman, 18 Ark. 320; LeBarron *v.* LeBarron, 35 Vt. 365.

[1] S. P. in Butler *v.* Butler, 4 Litt. 201; Dickinson *v.* Dickinson, 3 Murph. 327. And see Boggess *v.* Boggess, 4 Dana, 307.

[2] It is well to bear in mind the fact, that a considerable proportion of the ecclesiastical law, such as the law concerning the settlement of the estates of deceased persons, of marriages by contract *per verba de præsenti*, and so on, had always been in active use in New York, as in other States.

parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony, as together formed the law of the colony on the thirteenth day of April, 1775, were declared to be the law of the State; and he drew the inference, that, therefore, the law of England concerning divorces had not been received in the colony, and did not, under the constitution, become a law of the State.[1]

§ 73. **Continued.** — Chancellor Walworth afterward, in the case of Perry *v.* Perry, expressed his approval of this decision, in language which might seem to include a qualified approbation of the reasoning on which it is founded. And he laid down the following propositions: "Where the right claimed as a common-law right is of such a nature that it cannot be enjoyed in any manner, except by the direct interference of a judicial tribunal to give the remedy, if no tribunal has been organized by the law-making power for that purpose, we may fairly conclude the right does not exist. But whenever the legislature distinctly gives the right, without creating or appointing any particular tribunal to administer the remedy, we may fairly infer that it intended to vest that power in some of the existing tribunals of the country."[2]

§ 74. **Continued — Condonation — Temporary Alimony — Walworth's View.** — But it is worthy of observation, that the peculiar reasoning of Chancellor Sanford, in Burtis *v.* Burtis, was not essential to the point decided; and that the same conclusion would have followed from the course of argument laid down in the before-written sections. The same may be said of the case decided by Chancellor Walworth; which case, moreover, was determined upon another and different point in it; so that we may regard his propositions, above quoted,[3] in the light only of dicta. And plainly, neither of these learned judges intended to affirm any thing more than that a court, having no inherent jurisdiction over a subject either by statute or at common law, is not authorized to assume jurisdiction, merely because the legislature has not established such a

[1] Burtis *v.* Burtis, 1 Hopkins, 557.

[2] Perry *v.* Perry, 2 Paige, 501. See ante, § 69, note.

[3] Ante, § 73.

tribunal as the one in which the remedy is administered in England; and that the exercise of the right must await the action of the legislative will, in other words, must remain in abeyance until a jurisdiction is created. For, though the decisions of Chancellor Sanford run through but one volume of Reports, of which the case above cited is nearly the last, and thus the occasion to make this limitation to his opinion never arose; yet Chancellor Walworth, in a case in the same volume with the one above mentioned, and but a year before, expressly affirmed, of the law of condonation, that it did not rest upon the statutes of the State, but that "they are only declaratory of what the law was previous to their enactment." For the previous law, he referred to an English ecclesiastical authority, and added: "In that case Sir William Scott shows such to have been the settled law of England long before the American Revolution. It was, *therefore*, *the law of this State* at the time this suit was instituted." [1] And what is further conclusive of his opinion is, that not only for a series of years afterward, through his entire judicial career, was he in the habit of citing the English ecclesiastical decisions as authoritative precedents in causes of divorce, but in one instance he granted *ad interim* alimony where the statute was silent, — the point directly in controversy, — on the sole ground of such having been the law before and without the aid of the statute. In the course of his observations in this latter case occurs the following pointed remark, in relation to one of the English decisions: "The first of these cases," he said, "was more than twenty years previous to the Revolution, and shows what was the settled law on the subject at that time." [2] Also in Burr *v.* Burr he observed: "I have no doubt that the principles of the English decisions apply with full force to suits in this State for separation from bed and board for cruel treatment." [3]

§ 75. **Kent's View.** — So Chancellor Kent of the same State had long before laid down the broad proposition, that "the general rules of English jurisprudence on this subject must be

[1] Wood *v.* Wood, 2 Paige, 108. See also, to the same point, the opinion of Savage, C. J., in Johnson *v.* Johnson, 14 Wend. 637, 642.

[2] North *v.* North, 1 Barb. Ch. 241, 245.

[3] Burr *v.* Burr, 10 Paige, 20, 35. And see Devanbagh *v.* Devanbagh, 5 Paige, 554, 556.

considered as applicable, under the regulation of the statute, to this newly-acquired branch of equity jurisdiction," and, when the legislature conferred on the courts the power to grant divorce, it "intended that those settled principles of law and equity on this subject which may be considered as a branch of the common law, should be here adopted and applied." [1]

§ 76. **How laid down in Georgia.** — This question has been ably discussed by the Supreme Court of Georgia. No tribunal in this State — so the judge explained — had authority to hear causes of divorce, until the constitution of 1798 took effect, or perhaps until the passage of the act of 1802, four years later, to carry out an article of the constitution upon the subject. The article limited the causes of divorce to "*legal principles*," construed (perhaps erroneously, but this is not the point) to mean the law of the State as it stood at the time the constitution was adopted. And the court held, that, as there had been no previous colonial or State legislation on the subject, "that branch of the common law known and distinguished as the ecclesiastical law" was, at this time, the law of the State, which, in its application to divorce, was thus made substantially a part of the constitution itself. True, there had been a general act, in 1784, adopting the common law with the usual qualification, but this seems not to have much influenced the decision. Indeed it could not, for it was merely declaratory of the common-law rule.[2]

§ 77. **The Argument from Constant Practice — Nature of the English Law.** — But if the adjudications of our courts failed to establish the foregoing views by direct authority, they would still establish them by necessary implication. For it is the universal fact, running through all the cases, that everywhere in this country the English decisions on questions of marriage and divorce are referred to with the same apparent deference which is shown, on other subjects, to the decisions of the English common-law and equity tribunals. And in a matter like this, the usage of the courts determines the law of the courts. Nor, as we contemplate the learning and prac-

[1] Williamson *v.* Williamson, 1 Johns. Ch. 488.

[2] Head *v.* Head, 2 Kelly, 191. See also, as illustrating the same point, Finch *v.* Finch, 14 Ga. 362. But see Brown *v.* Westbrook, 27 Ga. 102. See post, § 99.

tical wisdom which pervade the judgments heretofore delivered at Doctors' Commons, can we fail to join in the opinion of Chancellor Kent, that this "supplemental part of the common law seems to be a brief, chaste, and rational code. It forms, in some respects, a contrast to the unwieldy compilations which constitute the canon law of the Roman Catholic countries, and which contain very circumstantial and many unprofitable regulations on the subject of marriage and divorce." [1] And though by some of our judges the wisdom of the ecclesiastical courts has not been deeply studied, the omission has arisen rather from the difficulty of access to its sources, and from the many calls to investigation in other legal fields, than from any want of belief in the binding authority here of this branch of the English law, or any failure to appreciate its intrinsic excellence.

IV. *How as to the Practice in Matrimonial Causes.*

§ 78. **Distinction between Law and Practice.** — In the foregoing sections of this chapter, we have examined the subject in a somewhat general way, without descending to the distinction, recognized in reason and somewhat in adjudication, between the law which binds the courts, and the practice which the courts may in some degree themselves control. To a greater or less extent, it is within the power, and properly so, of every judicial tribunal to regulate the course of procedure whereby suitors obtain the justice which the law leaves them no discretion to withhold, but commands them, in every case properly brought before them and sustained in proof, to grant. There is also room for the suggestion, that, when the legislature commits to a tribunal jurisdiction over a particular cause of divorce, it cannot be presumed to intend that the tribunal shall administer the remedy in forms of procedure altogether alien to its usual ones. Yet, on the other hand, when courts of law have been invested with equity jurisdiction, they have pursued the practice of the equity courts.[2] Perhaps this may be accounted for in part by the fact, that equity remedies could not be administered in common-law forms. But,

[1] Barrere *v.* Barrere, 4 Johns. Ch. 187, 196.

[2] See Commonwealth *v.* Sumner, 5 Pick. 360.

either in consequence of some course of reasoning which none of the cases explain, or in consequence of the fact, that, until latterly, the practice of the ecclesiastical courts was not understood even in England beyond the walls of Doctors' Commons, the American tribunals have not, to any minute extent, copied the English practice, though in some particulars they have done so; and we cannot, therefore, consider it as, in the absence of a statutory direction, generally binding in this country. The precise line between practice and law, as applied to this distinction, has been nowhere drawn, and it must be left to good sense and further judicial inquiry. The statutes of some of our States, it may be observed, direct how the procedure shall be; and these observations do not relate to them.

§ 79. **Views of Procedure.** — When we look into the courts of different countries, we observe, that, though they may administer substantially one common justice to suitors, they arrive at the end by ways often diverse from one another, while the minuter detail of their doings differs still more. From this fact we are led to another of the same sort; it is, that in countries like England, and like some of our States, where there are separate tribunals for the administration of distinct branches of one common jurisprudence, the same diversity in the practice of the different tribunals is also observable. But extending our inquiries still further we find, that, even in the same courts, when presided over by different judges, the minuter practice, in some of its details, differs. The result of all which is, that, in a degree, the practice of a court is what the presiding judge may be pleased to make it; *in a degree*, are the words, for in very many respects, indeed in most, the judge who for the time being presides over a tribunal is bound by the course of procedure already established by precedent.

§ 80. **Continued — Rules of Court.** — Perhaps we cannot better elucidate the propositions stated in the last section, than by referring to the law which concerns what are called general rules of court, whereby the judges who control a tribunal regulate in some measure its practice. It has been the custom of all our English and American judges, — those who presided over the equity, the common-law, the ecclesiastical, and all the other courts, — to establish from time to time general rules of

procedure; yet, strange though it may seem, our books of the law furnish us but little information as to the extent of the judges' power in this respect. That they have a certain extent of power, that the power has its limits, — these are two propositions which no lawyer will dispute; yet, bald as they are, they furnish us with almost all the light which we have in the matter. Perhaps the curious inquirer might satisfy himself, in some measure, by opening any book containing the general rules of any of the English courts, as they stand historically from the beginning of these things to the present time, and assuming the power to exist in the judges to make the rules. Yet the query would still present itself, whether, on the one hand, the judges had exhausted their full powers in this respect; or, on the other hand, whether in some instances they might not have overstepped their power. And it would be necessary for the inquirer to ascertain in each case, also, whether there was not an act of Parliament in pursuance of whose authority the rule was made.

§ 81. **Rules of Court, continued.** — The history of the rules of court in England is believed by the author of these pages, who does not deem the matter of sufficient importance to justify any extended citation of authorities to sustain his propositions, to be substantially as follows: Anciently the entire judicature of England was under the immediate control of the king, — he at one time sat personally upon his own king's bench, and his judges were then and for a long while afterward removable at his pleasure. In this state of affairs, it was competent for him to prescribe the practice of the court, and this he did by decree or order, wherein he often included such things as would now be deemed matters of general legislation. The decrees or orders thus made are now, indeed, reckoned sometimes as among the statutes of England; for the old English statutes are in part in the form of decrees by the king alone, in part in the form of such decrees put forth with the concurrence of his great council, in part in the form of petitions assented to by the king, and so on. Reeves, in his history of the English law, thus discourses upon this subject: "There is no way of accounting for this extraordinary appearance of the old statutes, but by supposing the state of our constitution and laws

to have been this, that, the judicature of the realm being in the hands and under the guidance of the king and his justices, it remained with him to supply the defects that occasionally appeared in the course and order of proceeding; which, being founded originally on custom and usage, was, in its nature, more susceptible of modification than any positive institution, that could not be easily tampered with without a manifest discovery of the change. In an unlettered age, it was convenient and beneficial that the king should exercise such a superintendence over the laws as to declare, explain, and direct what his justices should do in particular cases; such directions were very readily received as positive laws, always to be observed in future; and, no doubt, numbers of such regulations were made, of which we have at present no traces. While this supreme authority was exercised only in furtherance of justice, by declaring the law, or even altering it, in instances which did not much intrench upon the interest of the great men of the kingdom, it was suffered to act in freedom. But no alteration in the law which affected the persons or property of the barons could be attempted with safety, without their concurrence in the making of it; as, indeed, it could not always be executed without the assistance of their support. Thus it happened, that, when any important change was meditated by the king, a *commune concilium* was summoned, where the advice of the *magnates* was taken; and then the law, if passed, was mentioned to be passed with their concurrence. On the other hand, had the nobles any point which they wanted to be authorized by the king's parliamentary concurrence, a *commune concilium* was called, if the king could be prevailed on to call one; and, if the matter was put into a law, the king here was mentioned to have commanded it, at the prayer and request of his barons; so that, one way or other, the king is mentioned in all laws as the creative power which gives life and effect to the whole."[1] Therefore we may understand, that, as the kings of England withdrew from the judicial seat, and as the judges became independent of their sovereign, the latter assumed to themselves what had theretofore been the kingly power of making general rules of court,

[1] 1 Reeve Hist. Eng. Law, 3d ed. 216. See also 2 Ib. 354, 355; 3 Ib. 143.

except that they did not attempt to carry the power to so great a length as the kings had before done.

§ 82. **Rules of Court in Scotland.** — In Scotland, the courts ordain what are called *acts of sederunt*, an expression corresponding very nearly to the English expression *general rules of court*. The power to do this, however, is traced to an old statute of the Scotch Parliament. Erskine observes: "The powers committed by this statute to our Supreme Court are precisely limited to the forms of proceeding, which may be the reason why the Parliament hath in several instances ratified acts of sederunt, where it might seem that the court had exceeded their powers. But it must be acknowledged that many acts of sederunt have been made on matters of right, which, without any aid from the authority of Parliament, the nation hath acquiesced in universally. Such acts import no more than a public notification of what the judges apprehend to be the law of Scotland, which therefore they are to observe for the future as a rule of judgment. When an act of sederunt is confirmed by an inveterate custom and acquiescence of the community, such custom constitutes law of itself in the most proper acceptation of the words." [1]

§ 83. **Rules of Court in the United States.** — The legislation of our several States has more or less regulated this matter of general rules of court within the respective States. But there are a few points upon which there have been judicial decisions or dicta, and to these let us now turn, and so close our investigation of this particular topic. A learned Pennsylvania judge once observed: "Independently of all authorities to be found in the books, it is self-evident that justice could not be administered in an orderly manner, under a complex system of laws, without rules regulating the practice of the courts of justice. These courts must necessarily have the power of framing such rules as they may think best calculated to carry the laws into execution with convenience and despatch. All courts must have stated rules to go by; which may be altered at pleasure, as they may be found best to answer the public good." [2] And the general doctrine that, in the language of another judge of

[1] Erskine Inst. 1, 1, 40.

[2] Yeates, J., in Barry *v.* Randolph, 3 Binn. 277, 279.

the same State, "every court of record [and undoubtedly to some extent every court not of record] has an inherent power to make rules for the transaction of its business, provided such rules are not contradictory to the law of the land,"[1] may be deemed to be established American doctrine.[2]

§ 84. **Rules of Court, continued — Authority — Interpretation.** — There can be no valid rule contravening the provisions of a statute, or any doctrine of established general law, the benefit of which the party has a right to claim;[3] and, of course, though the court may have established a valid rule, it may be abolished by a legislative act, either in express terms annulling it, or ordaining something contrary in effect to it.[4] But until so abolished or superseded, or repealed by order of the court itself, it cannot in a particular instance be disregarded by the presiding judge, unless the rule itself provides for the exercise of such a discretion.[5] And there is a doctrine, the precise extent and authority of which are not certain, to the effect, that a rule of court cannot rest in parol, but it must be entered of record, and perhaps published, else it will not have perfect validity and force.[6] Likewise a rule of court operates only prospectively.[7] It must be so interpreted as to carry out its intent, even though thereby its application is withheld from a case to which in its letter it extends.[8]

§ 85. **Law and Practice further distinguished — Statutes creating a Jurisdiction.** — The foregoing doctrines concerning rules of court help us in our attempts to distinguish between law and practice. They show, at least, that, though our

[1] Tilghman, C. J., in Barry *v.* Randolph, supra, p. 278.

[2] See also Vanatta *v.* Anderson, 3 Binn. 417; Snyder *v.* Bauchman, 8 S. & R. 336; The State *v.* Clayton, 11 Rich. 581; Haines *v.* Stauffer, 1 Harris, Pa. 541; DeLeon *v.* Owen, 3 Texas, 153; People *v.* Jenks, 24 Cal. 11; and the cases cited in the notes to the next section. So, in England, "All courts must have stated rules to go by." Anonymous, 1 Stra. 315. And see Robinson *v.* Bland, 1 W. Bl. 257, 264.

[3] Kennedy *v.* Cunningham, 2 Met. Ky. 538; Thompson *v.* Hatch, 3 Pick. 512, 514; Boas *v.* Nagle, 3 S. & R. 250; Reist *v.* Heilbrenner, 11 S. & R. 131.

[4] The State *v.* Gale, 2 Wis. 693; Bishop *v.* The State, 30 Ala. 34.

[5] Hughes *v.* Jackson, 12 Md. 450; Burlington & Missouri River Railroad Co. *v.* Marchand, 5 Iowa, 468; Thompson *v.* Hatch, supra. And see Rathbone *v.* Rathbone, 4 Pick. 89.

[6] Risher *v.* Thomas, 2 Misso. 98; Owens *v.* Ranstead, 22 Ill. 161; Fullerton *v.* The Bank of the United States, 1 Pet. 604, 613.

[7] Dewey *v.* Humphrey, 5 Pick. 187; Owens *v* Ranstead, supra.

[8] Ferguson *v.* Kays, 1 Zab. 431.

ancestors may have imported to this country from the parent land a particular branch of the law, administered there in a tribunal not imported, and the like of which we have not set up for ourselves, the legislature, in giving a jurisdiction over this branch to a tribunal of another sort, may not have intended to impose on it the peculiar foreign practice. There is an illustrative doctrine of statutory interpretation, elsewhere stated by the author as follows: "If a word or phrase, or statutory provision, is adopted from the laws of another State, or from England, or even from the civil law, it will ordinarily be construed by us the same as in the law from which it was taken; but we are not in any absolute sense bound by the foreign exposition, which is considered less controlling than the domestic."[1] The result of which would seem to be, that, since we are not absolutely bound by the foreign expositions, *a fortiori* we are not by the foreign practice. And on this point the Ohio court observed: "Where a practice has grown up under a statute, in a particular and sovereign jurisdiction, it is no just inference, that, if another sovereign jurisdiction ingraft the same statute into their code, they intended to ingraft also, into their practice, the practice founded upon it in the jurisdiction from whence it was taken. The provisions of the statute may be well adapted to the institutions of the government adopting it. The practice founded upon it may be adverse to these institutions; and these facts must enter into the determination, whether the construction is to be adopted or not. This rests upon the decisions of courts, and cannot be deduced from the mere fact of enacting the statute."[2] At the same time we must bear in mind, that, when the legislature gives to a court jurisdiction over a particular cause or ground for divorce, it introduces no new law, but only authorizes the tribunal to administer a pre-existing common law, as already explained; while, on the other hand, when it adopts a statute from another State, it establishes, not a new jurisdiction merely, but a new law; consequently the view entertained by the Ohio court may not necessarily apply to a divorce case. Therefore it was laid down in Vermont, in a case which appears to have been particularly well considered, that, when jurisdic-

[1] Bishop Stat. Crimes, § 97. [2] Gray *v.* Askew, 3 Ohio, 466.

tion over any subject of divorce is bestowed on a judicial tribunal, it is to be exercised according to the settled principles and practice of the English ecclesiastical courts, as far as applicable to the altered condition of things here, and the spirit of our laws; and it is not a mere statutory jurisdiction, limited wholly to the terms of the statute.[1]

§ 86. **Conclusion and Summary.** — The conclusion to which the author has arrived, as the result of much reading and reflection on this subject, is, that such parts of the English practice as relate to the substantial rights of the parties, like, for instance, the wife's claim to alimony pending a suit, and some others, are just as binding on our tribunals, until a statute changes the common law, as are those rules in the English system which are technically termed the law, in distinction from the practice. As to questions of mere practice, the author deems the true view to be this: If the matter is one wherein the course of procedure was in the ecclesiastical courts directly adverse to the ordinary course of procedure in the American tribunal, then the English practice will be rejected. If the English procedure, though unknown to the usual American practice as concerns other things, is still not repugnant to it, and the American procedure has provided no course adapted to the case, the English procedure will be followed. If an American statute has particularly provided for the case, it, of course, governs; so does a rule of court, provided the rule is one which it was competent for the tribunal to establish. These views are, indeed, general; we shall forbear to descend into the particulars until we come to consider particular questions of practice; but, general as they are, they will still help to guide us throughout the course of our entire subsequent investigations.

[1] LeBarron *v.* LeBarron, 35 Vt. 365.

CHAPTER V.

THE STATUTORY LAW OF MARRIAGE AND DIVORCE IN THE UNITED STATES.

§ 86 *a*. **Scope of this Discussion.** —It is not proposed to collect and present to the reader the various provisions of statutes found in our States, relating to this subject of marriage and divorce; but to give only a general view of the statutory law as respects its peculiar features, and some of the principles by which it is to be interpreted. Most of the details of statutory interpretation, and the details of the statutes themselves, if to be entered into at all in these volumes, will be found interspersed through subsequent chapters.

§ 87. **General View — State Laws.** — The last chapter, though, by its title, devoted to a consideration of our common law of marriage and divorce, was, in fact, almost exclusively occupied with the part of the subject which relates to divorce alone. And the reason was, that, as to marriage, there is no doubt, and what has not been debated in the courts does not need to be debated here. The same remark applies, yet less broadly, to the subject of the present chapter. All our marriage and divorce laws, and of course all our statutes on the subject, so far as they pertain to localities embraced within the territorial limits of particular States, are State laws and State statutes; the national power, with us, not having legislative or judicial cognizance of the matter within these localities.[1]

§ 88. **Jurisdiction of Congress.** — Yet it was, of course, competent for Congress to provide, as it did by Stat. 1850, c. 158, while the District of Columbia was under its direct legislative control, for divorces there; since marriages were there celebrated under national law; and it is *competent* for Congress to authorize divorces in the Territories, though in practice this subject, like others of local legislation, is usually left with the

[1] Barber *v.* Barber, 21 How. U. S. 582.

territorial legislature. Chancellor Kent reminds us, that Congress, "by an act of the 15th of May, 1826, c. 46, annulled several acts passed by the governor and legislative council of the Territory of Florida granting divorces;"[1] and, in 1862, a statute was by the national legislature passed (Stat. 1862, c. 126) for punishing polygamy in any "Territory or other place over which the United States have exclusive jurisdiction." In like manner, the national statute of 1860, c. 179, § 31, enacts, that "all marriages in the presence of any consular officer in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia, shall have the same force and effect, and shall be valid to all intents and purposes, as if the said marriages had been solemnized within the United States." There can be no doubt that these several acts were authorized by the supreme law of our Constitution.[2]

§ 89. **Careless and Defective Legislation — Difficult of Interpretation.** — As already observed, it is not proposed to set out, *in extenso*, the statutes of our several States, relating to marriage, or relating to divorce. Should this be done, a very great number of pages would be occupied with that from which very little benefit would result to the reader. But it is observable, that the statutory law of this country, upon this subject, seems in general to have been drafted by men who either did not possess much knowledge of the unwritten law respecting it, or did not regard such unwritten law as worthy to be considered in framing the statutes; and who, moreover, gave but little thought to what would be the practical workings of the statutes. The interpretation of these enactments, therefore, becomes difficult; and, though it is not generally well for an author to proceed with his elucidations much in advance of adjudication, yet it is believed that something may profitably be said in this connection upon points concerning which the courts have not spoken, or have spoken indistinctly, as well as upon those which are better settled. We shall in no case walk without our guides; for the courts, in dealing with other questions, have already established such general rules of interpretation as will serve us in these particular instances.

[1] 2 Kent Com. 105, note.

[2] See post, § 398.

§ 90. **Some Leading Principles of Interpretation.** — Now, in consequence of this particular condition of the statutory law on this subject, it becomes often necessary to resort to the very liberal and comprehensive rules of interpretation which the wisdom of the past has established for cases in which it is plain that what is meant is not exactly or fully what is in form said. One of these rules of interpretation, or rather a summary of many rules, is, "that all provisions of law, statutory and common, at whatever several dates established, are to be construed together, as contracting, expanding, enlarging, and attenuating one another, into one harmonious system of jurisprudence;"[1] and, in pursuance of this doctrine, statutory provisions are, by construction, both expanded in their meaning, and cut short in their meaning, by the common law.[2] Another proposition is, that "words and expressions inaccurately used will receive the meaning intended, where it appears on the whole face of the act;"[3] and, since the statutes are to be construed in reference to the common law, as well as in reference to one another, the rule here being, that "statutes in derogation of the common law, or of a previous express enactment, are to be construed strictly, not operating beyond their words, or," to effect a repeal of the prior law, "the clear repugnance of their provisions"[4] to such prior law, — plainly, if there is a statutory provision expressed in such awkward or unscientific language as to require it to be bent out of its literal meaning in order to carry out what was evidently the legislative intent, as appears from a comparison of part with part, or a comparison of the whole with the common law, the court, in construing the provision, will — since the court must, or fail to do the first duty involved in statutory interpretation, namely, follow "the meaning of the legislature"[5] — so bend the enactment as to accomplish this object. Let us look, then, at some of the provisions of those inconsiderately drawn statutes to which reference has already been made.

§ 90 *a*. *The Matrimonial Consent:* —

How, in General. — We shall have frequent occasion to con-

[1] Bishop Stat. Crimes, § 123.
[2] Ib. § 118–121, 134–140.
[3] Ib. § 81.
[4] Ib. § 155.
[5] Bishop Stat. Crimes, § 70, 82.

sider, in these volumes, the fundamental doctrine of matrimonial law, that there can be no marriage except between parties who voluntarily agree to be husband and wife. The law, in some of our States, requires formalities to be added to this mere mutual consent; but the consent itself is not dispensed with, and without it there can be no marriage.[1] When this consent and any formalities required by law combine, then, as a consequence, not only the parties assume the status of married persons, but third persons are, or may be, affected in their property interests. Now, if a man and woman, capable of intermarrying, should be brought together by brute force, and an official person should say a marriage ceremony over them, they not consenting, this profanation of the marriage rite would not make them husband and wife. And if the legislature should step in and declare them to be, therefore, married, the act would be a high outrage, in the name of legislation; but there would be, at least, doubt, whether it would be binding under the constitutions of our States.

§ 90 *b*. **Insanity — Virginia Statute.** — If a person is insane, he can consent to nothing. Therefore, within the doctrine just stated, it does not constitute marriage for an official person to pronounce the marriage ceremony over a man and woman one of whom is insane.[2] It would not change the status of the parties; and, *a fortiori*, it could not take any rights of property from third persons, who did not even in form consent to what was done. But if we turn to the statutes of Virginia, we shall find the following: "All marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, shall be absolutely void, without any decree of divorce, or other legal process. All marriages which are prohibited by law on account of consanguinity or affinity between the parties, all marriages *solemnized when either of the parties was insane*, or incapable from physical causes of entering into the marriage state, shall, if solemnized within this State, be void *from the time they shall be so declared*

[1] Post, § 121, 124, 125, 156, 216, 218, 219, &c.

[2] See, for the doctrine discussed, post, the chapter commencing with § 124.

by a decree of divorce or nullity, or from the time of the conviction of the parties under the third section of the one hundred and ninety-sixth chapter."[1]

§ 90 *c*. **Virginia Statute, continued.** — Now, the meaning apparent on the face of this provision is, that, if a ceremony of marriage is gone through with while one of the parties is insane, the marriage is for the time being absolutely good. It transfers the woman's property to the man, abates any suit which may be pending against her, takes from one who has sued the man the right to use her testimony in evidence, and so on. True, there may be a divorce; but, even then, the marriage will not be made void from the beginning, but only from the date of the decree, after the above-mentioned consequences have been irrevocably wrought. Does the statute really mean all this? Could any body of men be so demented as intentionally to pass such an act? And, if this is the meaning, is the act constitutional? The author confesses himself incapable of answering these questions. All he can safely say is, that young ladies of fortune in Virginia should beware how they become insane.

§ 91. **Massachusetts Statute.** — In the Massachusetts statutes, we find the following language: "Sect. 1. All marriages solemnized within this State, which are prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a former wife or husband then living, or when either party was insane or an idiot, *shall be void without any decree of divorce or other legal process.* Sect. 2. The validity of a marriage shall not be questioned in the trial of a collateral issue, on account of the insanity or idiocy of either party, but only in a process duly instituted in the lifetime of both parties for determining such validity."[2] Now, the first of these two sections seems to be a very plain, as well as, perhaps, a reasonable provision. By the common law of marriage, the impediment of consanguinity or affinity renders the marriage, not void, but voidable, — a matter to be explained in our next chapter. Here the rule is, by the statute, changed. But the other two impediments, namely, the existence of a previous marriage, by force of which one

[1] Va. Code of 1860, p. 529, § 1. [2] Mass. Gen. Stats. c. 107, § 1 & 2.

of the parties is already a married person, and the want in one or both of them of mental capacity adequate to entering into the contract of marriage, render, by the common law, the marriage void. Therefore, as to these two latter impediments, the statute — namely, the first section — appears to be declaratory of the common law.

§ 92. **Continued.** — But when we look at the second section, we find a provision relating to the impediment of the want of mental capacity, rendering the marriage, not "void," as the first section declares it to be, but *voidable*. And when the reader comes to peruse our next chapter, he will see that the language of this second section is just as precise and accurate to declare the marriage voidable, though it does not use the word, as is that of the first to declare it "void," though it does use the word. Do these sections, then, taken together, and taken in connection also with all the other statutes of Massachusetts, and with the unwritten law as imported into this country from England, operate to make the marriage, where the impediment of an unsound mind exists, void or voidable, or something else which is not aptly signified by either of these words?

§ 92 *a*. **Continued — Vermont.** — In a Vermont case,[1] to be more particularly considered in a chapter further on,[2] the broad doctrine was laid down under a statute somewhat analogous, that the marriage is voidable, and not void. But this case would not be received in the other States generally as of much weight; because, though the court is a highly respectable one, it did not have before it either the authorities or the reasoning which would conduct to the contrary conclusion; and the judges even laid it down that such is the doctrine of the common law, without being apparently aware that there is any differing doctrine contained in the books.

§ 93. **A more General Provision.** — We find in several of the American States another similar statutory provision, which, without attempting an accurate history of it, we may mention as having apparently originated in New York.[3] In Wisconsin,

[1] Wiser *v.* Lockwood, 42 Vt. 720.

[2] "Want of Mental Capacity," commencing post, § 124.

[3] 2 Kent Com. 77.

it is, or was, in the following words: "When either of the parties to a marriage, for want of age or understanding, shall be incapable of assenting thereto, or when the consent of either party shall have been obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be void *from the time its nullity shall be declared* by a court of competent authority."[1] We have no judicial expositions of this strange enactment, — certainly as strange and blind as the one just quoted from Massachusetts, and quite analogous to the one from Virginia. Does it make people married without their consent? If a ruffian robs a woman of her jewelry, he gains thereby no title to it; but, if he holds her by the throat while words of marriage are said over her, does he then become legally invested with all her personal property? Must she be regarded as his wife, till she brings him into court and proves her want of consent? And even then does she take his name, and does she recover back her property only if the court reinvests the title in her? And if she dies before sentence dissolving the marriage (the sentence not being one of nullity), does her personal estate remain vested in him, to the exclusion of those who would otherwise be her legal representatives, and is he entitled to take out administration? Perhaps this statute may be construed as merely a re-enactment of the common-law doctrine, that judicial sentences of nullity of marriage are conclusive upon strangers as well as parties and privies.

§ 94. **Continued.** — But evidently this provision of statutory law was written, enacted, and re-enacted, without any accurate apprehension, in the minds of those concerned, of the subject to which it relates. Such a thing is not surprising, when we consider the small amount of legal culture which the subject of marriage and divorce had formerly received, either in the United States or in England, out of the ranks of the practitioners and judges of the ecclesiastical courts, where all direct jurisdiction over the subject resided. Even Professor Greenleaf, one of our most accomplished law writers, has fallen into the inaccuracy of apparently laying down the rule, that, whenever a marriage is sought to be "invalidated on the ground of

[1] Wisconsin, R. S. c. 79, § 2.

want of consent, the subject must have been investigated and the fact established in a suit instituted for the purpose of annulling the marriage," or it will be held good.[1] This proposition is plainly unsupported by reason or authority, and especially unsustained by the authorities he cites. We have already seen, that consent is the essence of marriage, without which it cannot exist. A government which should compel people into matrimony without their consent, could not be endured. And though it should grant the right to obtain a divorce on a judicial proceeding instituted for the purpose, that would be but a partial and inadequate recompense for such a wrong.[2] But this particular matter, as one pertaining to the unwritten law, we shall have occasion to examine in another place, where we shall also discover, that even of late the minds of some judges have been draped in mist upon this subject.[3]

§ 95. **Further as to Foregoing Statutes.** — When we turn to examine the common law of marriage, in aid of our inquiry how a statute such as the Wisconsin and Massachusetts ones is to be construed, we find, as already mentioned,[4] and as we shall see still further in subsequent pages, that never under the common law is marriage as a status imposed on parties who do not consent to accept the status. This principle runs through the entire extent of that unwritten law which our forefathers brought hither from the mother country. It radiates, too, through all the domains of our reason. It is a principle to which the world long ago assented, and which no man yet has appeared, either in this country or any other, with enough of folly to deny. And if a modern legislature really meant to overturn this principle, the intent would be announced, not only in competent words, but in words standing in such a connection as to admonish us that here, in this place, reason was deliberately buried and folly was galvanized into life. Therefore neither the Massachusetts nor the Wisconsin statute should be construed to mean what its words signify. But in

[1] 2 Greenl. Ev. § 464, note.

[2] And see 1 Hawk. P. C. 6th ed. p. 172, § 9, note; Wells *v.* Fletcher, 5 Car. & P. 12; Wells *v.* Fisher, 1 Moody & R. 99.

[3] See post, § 105, 125, 136.

[4] Ante, § 3, 12, 19.

Massachusetts, as, during the life of the insane parties, a proceeding may be instituted to set aside the marriage by reason of the insanity, the second section above quoted should be holden to require such a proceeding to be instituted, whenever a man would undertake, during their lifetime, to deny the marriage. On the other hand, as no such direct proceeding can be had after the death of one of them, such death should be holden to entitle any person interested to deny the consent, — in other words, to deny the marriage, — when the question comes up collaterally. And, as observed by a Massachusetts judge before the statute was enacted: "If it would be hard that the issue of such marriages should be deemed bastards, it would be as much so that human beings without reason, or their families, should be the victims of the artifice of desperate persons, who might be willing to speculate on their misfortunes." [1] And the like interpretation should be applied to the

[1] Parker, C. J., in Middleborough *v.* Rochester, 12 Mass. 363, 365. There is a single Massachusetts case in which this statute passed under the review of the court. After the death of a party to a supposed marriage, the question of marriage or no marriage came up collaterally on the trial of a pauper cause, and one of the parties to the suit offered to prove the party to the marriage to have been insane at the time of its solemnization, but the judge refused to admit the proof, and the whole court sustained this ruling. The marriage had been celebrated previous to the enactment of the statute, and the point taken by the counsel objecting was, that either the statute was not meant to be applied to a pre-existing marriage, or, if it was, it was for this cause unconstitutional. Goshen *v.* Richmond, 4 Allen, 458. I have no hesitation in concurring in the opinion which overruled this particular twofold objection. But the point made in our text still remains, as one, if not of constitutional law, still as one of statutory interpretation. Let us put the bald case of a man procuring the marriage ceremony to be performed between himself and a rich woman, confessedly an idiot, with whom he never cohabits for a day; she dies, the fact of this mockery of marriage being unknown to her friends, without any measures taken in her lifetime to set it aside; or, the fact being known to them, and measures being taken, she dies before the cause reaches a final judgment; and he comes in and claims all her property, as her husband, by virtue of his marital rights, — does this statute so operate as to give him the property? Said Metcalf, J., in the case just cited, "The purpose of the statute was to alter the law of evidence on a single subject, by making inadmissible certain proofs which were before admissible." But it is not easy to conceal so great a fact as this under a name. The statute does not say any thing about rules of evidence; and, whether we use one term or another, if, in the case just supposed, — a case, let it be understood, in which the idiocy is palpable, just as palpable as the existence of the person herself, — "the validity of the marriage shall not be questioned," then has the legislature imposed the status of marriage on an idiot who could not consent, and who did not consent; and has conferred riches on a villain, in reward for the

Wisconsin statute, so far, at least, as to protect parties from either a direct or a collateral judgment, making them married, when they have not consented to marry, and to protect third persons from being affected in their interests by any such judgment.[1]

§ 95 *a*. *Other Principles of the Unwritten Law combining with the Statutes* : —

Condonation. — In further illustration of the doctrine that marriage and divorce statutes must, like all others, be construed in combination with the unwritten law, and in accord with it, we may refer to Stat. 20 & 21 Vict. c. 85, § 30, already copied into a note.[2] This provision makes it a bar to the suit if the plaintiff "has *condoned* the adultery complained of." Thereupon a case arose in which the defendant proved condonation, thereby bringing himself fully within the terms of the statute; but it appeared also, that the defendant had afterward been guilty of such conduct as, according to the practice which before prevailed in the ecclesiastical court, would have revived the adultery thus condoned. Was it, therefore, revived under the statute? The court held that it was. "Condonation," said the learned judge, "is strictly a technical word. It had its origin, and as far as I know its entire use, in the ecclesiastical courts, and it means 'forgiveness with a condition.' The statute says, that, if the petitioner has condoned, that is, has conditionally forgiven, the adultery complained of, the petition shall be dismissed. . . . I think the statute means, not that the petitioner shall be barred of her remedy if she has ever

practice, by the most base and debasing means, of his art. Is it the true legal construction which presumes that the legislature intended this? The construction apparently given by the court to this second section proceeds necessarily on the assumption, that the language used in the first section does not convey the true legislative intent; this language is bent out of its plain and obvious meaning in order to give meaning to the second section: — Why, then, since we find the legislature here employing words inaccurately, should we cast the whole burden on the first section, bending its words from their legitimate meaning, in order to let the words of the second section stand upright, where the effect is to reach a result which, if the legislature was composed of sane men, it could not possibly have intended?

[1] See Brown *v.* Westbrook, 27 Ga. 102, referred to also in a note to the next section, yet this case sheds but little useful light.

[2] Ante, § 65, note, par. 2.

condoned, but that she shall be barred of her remedy if the condonation is still existing." [1]

§ 96. **Breaking the Bond, or declaring that it never existed.** — The statutes of Massachusetts [2] provide, that "a divorce from the bond of matrimony may be decreed for *adultery* or *impotency* of either party." Now, according to our common law on this subject, as we shall see particularly in the appropriate chapter, impotency, to be a ground of divorce, must exist at the time of the marriage, as an impediment which renders the marriage *voidable*, but not void.[3] Adultery, on the other hand, if it exists as a fact which transpired anterior to the marriage, is no cause for divorce; it must assume the form of an offence committed against the marriage after its celebration; and then the sentence for divorce for this cause annuls the marriage from the time when the sentence is pronounced, while the sentence of divorce for impotency pronounces it to have been originally void, and never of any legal effect. Adopting, therefore, the rule of construing statutes to harmonize with the common law,[4] we shall have no difficulty in coming to the conclusion, that, in Massachusetts, notwithstanding the statutory provision just quoted, impotency and adultery are dissimilar in their nature and consequences, — the former rendering the marriage *voidable*, therefore liable to be adjudged to have been void from the beginning, while, until sentence rendered, it is legally good; and the latter being such a breach of matrimonial duty as to justify the courts in dissolving the marriage, by judicial sentence pronouncing it void only from the time of sentence rendered.[5] This principle of interpretation will also assist us to understand many other statutes, which, did we not regard the common law, in its relation to the subject, would be blind in their meaning. Well has Lord Coke said: "To know what the common law was, before the making of any statute, is the very lock and key to set open the windows of the statute." [6]

[1] Dent *v.* Dent, 4 Swab. & T. 105, 107, 108.

[2] Gen. Stats. c. 107, § 6.

[3] Post, § 339.

[4] Ante, § 90, 95 *a*.

[5] See, as perhaps illustrating these views, Bascomb *v.* Bascomb, 5 Fost. N. H. 267. But see Brown *v.* Westbrook, 27 Ga. 102. And see post, § 120, 137.

[6] 2 Inst. 308.

§ 97. **Issue of Marriage Void for Consanguinity or Affinity.** — We have seen, that, by § 1 of a Massachusetts statute already quoted,[1] a marriage prohibited on account of consanguinity or affinity between the parties is declared to be "void without any decree of divorce or other legal process." Now, § 28 of the same statute provides, that "the issue of a marriage dissolved by a divorce or sentence of nullity on account of consanguinity or affinity between the parties shall be deemed to be illegitimate." Does it result from this section, that, when there has been no decree of divorce or nullity, the issue will be legitimate, in accordance with the rule which would prevail had not the common law, whereby such a marriage is merely voidable, been superseded by the statute which declares it void? One would suppose this to have been the meaning of the draftsmen of the statute; for, though the principle of the common law that where there has been a marriage pronounced void by a sentence of nullity the children are bastards, is so very plain as to make any such re-enactment of it as we have here in a book of statutes almost ridiculous, we shall search in vain for any known rule of interpretation from which the result thus indicated can be derived. There is indeed the maxim, *Expressio unius est exclusio alterius;*[2] but this maxim has its principal application to cases where the legislature establishes something new in the law, and it does not ordinarily apply to statutes introduced merely to modify the common law, or to give to the courts a jurisdiction over a matter of common-law cognizance. Perhaps a very doubtful principle held in Massachusetts and a few of the other States, to an extent and in circumstances not easily ascertained, to the effect, that, as stated elsewhere by the author, "where a new statute covers the whole ground occupied by a previous one, or by the common law, it repeals by implication the prior law, though there is no repugnance,"[3] may be forced into the service of the construction which renders the issue legitimate, in the absence of any decree of nullity; but the difficulty is, that here is no extended legislation covering the whole subject of legitimacy,

[1] Ante, § 91.
[2] Bishop Stat. Crimes, § 249.
[3] Ib. § 159.

and the rule of the common law is very distinct, whereby the issue of all void marriages, even in the absence of a sentence of nullity, is held to be illegitimate. On the whole, therefore, we must deem this common-law rule still to prevail to its full extent, though the statute affirms it only in part. And in reason, as the law holds the parents not to be in wedlock, how can we deem the children thus born out of wedlock to be entitled to the same rights as if born in, unless the statute, by some direct words, not by a mere omission of words, makes them so?

§ 98. *Whether Divorce Statutes apply to Past Transactions:* —

Question stated. — When we turn from the consideration of these particular provisions to some general principles regulating the interpretation of divorce statutes, and regulating their validity, we are met by the query, whether, if a statute authorizing divorces for some new cause is silent upon the point of its applicability to matrimonial offences already committed, it is to be applied, or not, to past transactions? Then, suppose, instead of being silent on this point, it expressly, in its language, extends to past transactions, — is it herein void as violating the written constitution of the State?

§ 99. **How in General — Illustrations — Desertion — Cruelty — Conviction for Felony.** — In the first place, waiving the constitutional question, other statutes are not generally construed to be retrospective, but some are.[1] And when we come to divorce statutes, the doctrine which at the first impression appears to be, on the whole, best sustained by authority, is, that no statute will be construed to include past offences, unless there is something upon its face distinctly indicating this intention.[2] Thus, an act which provided, "that divorces from the bond of matrimony shall be decreed in case either of the parties shall wilfully desert the other" for a period specified, was held to apply only where the entire desertion occurred

[1] Bishop Stat. Crimes, § 82, 84, 85.

[2] Jarvis *v.* Jarvis, 3 Edw. Ch. 462; Sherburne *v.* Sherburne, 6 Greenl. 210; Given *v.* Marr, 27 Maine, 212; Scott *v.* Scott, 6 Ohio, 534. See also Head *v.* Ward, 1 J. J. Mar. 280; Briggs *v.* Hubbard, 19 Vt. 86; Miller *v.* Commonwealth, 5 Watts & S. 488; Fultz *v.* Fox, 9 B. Mour. 499.

subsequently to its becoming a law.[1] And in Georgia, where the statute provided, that "from and after the passage of this act the following shall be the grounds or legal principles upon which divorces from the bond of matrimony shall be granted," and then proceeded to make cruel treatment one of the grounds, the court held, that, to bring a case within the statute, the cruel treatment should have been inflicted subsequently to its enactment.[2] And in Iowa, a like doctrine as to desertion seems to have been rather assumed than held, the point decided being, that, where the statutory period has fully run since the enactment of the statute, this is sufficient to authorize the divorce, though the desertion commenced before the statute was passed. Said Wright, C. J.: "When the cause called for by the statute is a continuing one, although it may have begun before the enactment of the statute, yet, if it be continued after the passage, the period required therein, this is sufficient, and the case comes within the act. In such a case, it is the future and not the past act which becomes the offence."[3] In New Hampshire, a provision, "that divorces from the bonds of matrimony shall be decreed in favor of the innocent party, when the other shall be convicted of a felony, and actually imprisoned for the same," was construed not to authorize a divorce where the conviction and imprisonment took place before its enactment.[4]

§ 100. **Continued — Desertion — Adultery — Living Separate.** — On the other hand, where, in Massachusetts, desertion was first made, by Stat. 1838, a ground for divorce from the bond of matrimony, the uniform practice was to grant the divorce, though the desertion had taken place before the statute was enacted. True, desertion was, previously to this time, a ground for divorce from bed and board, but this fact probably had nothing to do with the decisions. The words of the statute were: "A divorce from the bond of matrimony may be decreed in favor of either party, whom the other shall have wilfully and utterly deserted for the term of five years con-

[1] Stat. of Maine, 1829, c. 440; Sherburne *v.* Sherburne, 6 Greenl. 210.

[2] Stat. of 1850; Buckholts *v.* Buckholts, 24 Ga. 238. See ante, § 76.

[3] McCraney *v.* McCraney, 5 Iowa, 232, 255.

[4] Greenlaw *v.* Greenlaw, 12 N. H. 200.

secutively, and without the consent of the party deserted." [1] And a statute of the same State having declared, "that, when any woman shall hereafter be divorced from the bond of matrimony, for the cause of adultery committed by the husband, . . . the court, by whom such divorce may be decreed, shall have power to assign to her, for her own use, all the personal estate which the husband hath received by reason of the marriage, or such part thereof as shall be just and reasonable," this was held applicable as well where the adultery was committed before, as after its passage.[2] So where, in Wisconsin, a statute authorized a divorce "whenever the husband and wife shall have voluntarily lived entirely separate for the space of five years next preceding" the commencement of the suit, it was held applicable to cases where the five years had partly elapsed before the passage of the act. "This law," observed Cole, J. "establishes a new ground of divorce, and is based upon the principle that, where husband and wife have voluntarily lived entirely separate for a period of five years, the interest of society and public morality, as well as the good of the parties themselves, will be best promoted by a dissolution of the marriage relation. There is nothing in the language of this statute which would seem to require that the five years' separation must have occurred after the law took effect, and we must presume that it was intended to apply to present separations as well as future ones." [3]

§ 101. **Foregoing Doctrines examined — Judgments in Criminal Cases — Minors made of Age by Marriage.** — If we carefully examine the language of those statutes which were held not to apply to pre-existing transactions, we shall notice, that, in most of them, this conclusion appears perhaps sufficiently plain as matter of legislative intent, lying within the very words employed. Thus, when "either of the parties *shall wilfully desert*," "*shall be convicted* of felony," and the like, — these words point to future transactions. Still, it is true, that ordinary statutes relating to other subjects are not generally to be construed as applying to transactions already passed.[4]

[1] Mass. Stat. 1838, c. 126, § 1; Stevens *v.* Stevens, 1 Met. 279.

[2] West *v.* West, 2 Mass. 223.

[3] Cole *v.* Cole, 27 Wis. 531, 534.

[4] Bishop Stat. Crimes, § 82.

Yet this is very far from being a universal rule. Thus, where it was provided, that, "whenever a final judgment in any criminal case shall be reversed by the Supreme Judicial Court upon a writ of error on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had," — the court construed the enactment to apply to judgments pronounced before it was passed; and held, that such application was no violation either of any constitutional provision, or of any natural right.[1] It is not necessary that we should enter into a full consideration of this question; but there is one class of cases, not in the strict sense matrimonial, worthy of particular notice here. Thus, where it was provided "that every female under the age of twenty-one years, who shall marry in accordance with the laws of the State, shall, from and after the time of such marriage, be deemed to be of full age," — a matter pertaining, not to the status of matrimony, but to the status represented by the word majority, — "and shall have all the rights and privileges to which she would have been entitled had she been, at the time of her marriage, of full age," — this statute was held to apply to female minors married before its passage.[2] It was expressive, like statutes relating to divorce and marriage, of the legislative judgment concerning parties standing in the situation pointed to by the statute; and, whether the situation was created before the statute, or the statute before the situation, this could not be material.[3]

§ 102. **Continued.** — Now, an act regulating divorces would seem to be expressive of the legislative will as to what status, in respect of marriage, it is fit for persons to bear after the facts specified in the act have transpired; therefore the same reasons which would make the statutory direction applicable

[1] Mass. Stat. 1851, c. 87; Jacquins *v.* Commonwealth, 9 Cush. 279. Yet see Watkins *v.* Haight, 18 Johns. 138.

[2] Chubb *v.* Johnson, 11 Texas, 469.

[3] See also, as illustrating this doctrine, Andrews *v.* Russell, 7 Blackf. 474; Miller *v.* Moore, 1 C. P. Smith, N. Y. 739; Bronson *v.* Newberry, 2 Doug. Mich. 38; Goshen *v.* Richmond, 4 Allen, 458, observed upon, ante, § 95, note.

to future transactions would seem to render it equally so to past. The law, indeed, may be presumed to have been framed as much with reference to present facts as to future ones. In questions of mere private right, a different reasoning applies; for it would be inequitable to adjust the claims of individuals by a rule which did not exist when the facts occurred, consequently the legislature should not ordinarily be presumed so to intend. But the primary object of divorce laws is to regulate the order of society, and purify the fountains of morality; though the suit itself is, as between the parties, a private controversy.[1] Views such as these should lead us, in all cases where the legislative intent is not plain in the words, to prefer the construction which makes the statute applicable to past, the same as to future offences.

§ 103. **Continued — New Jurisdiction over Old Cause.** — But if the statute were, instead of being an original provision authorizing a divorce for something which was not a ground of divorce under the unwritten law, an authority simply to some tribunal to take judicial cognizance of causes which were recognized as such by the law which our forefathers imported to this country, — as, for example, if it merely gave to a court the power to sunder the bond of matrimony in cases of impotence, — then, of course, and for still other reasons, the statute should be construed to apply to past facts, as well as to future ones. This is a principle so plain as not to require any elucidation. It is founded on the everywhere received distinction between the right and the remedy; between the cause of action and the jurisdiction to hear the complaint. Even if the divorce were a criminal proceeding, this reasoning would apply.[2]

§ 104. **Constitutional Question — Conclusion.** — The remaining question is, whether it is not a violation of written provisions found in most of our State constitutions, to apply a divorce law, which provides a new cause of divorce, to an old transaction. The answer to this question is, in general terms, that it is not.[3] But a discussion of this question leads us into a consideration of the same principles which will necessarily

[1] Elwell *v.* Elwell, 32 Maine, 337.
[2] Bishop Stat. Crimes, § 175–180.
[3] Carson *v.* Carson, 40 Missis. 349.

pass under our review in examining legislative divorces; so it will be postponed for the chapter which relates to such divorces.[1] And there are many other questions of statutory interpretation to be discussed in these volumes, best postponed till they arise in their natural order.

[1] Post, § 696 et seq.

BOOK III.

IMPERFECTIONS IN THE CONSTITUTION OF THE MARRIAGE.

CHAPTER VI.

THE DISTINCTION OF VOID AND VOIDABLE.

§ 104 *a*. **Purpose of this Chapter.** — The distinction of void and voidable in marriage is one of a peculiar nature; since, though a distinction bearing the same name is known in other things in the law, it is not precisely like the distinction in the matrimonial law. If, therefore, before we enter upon a consideration of the several specific impediments to marriage, we take a somewhat minute view of this distinction, we shall find our way through the discussions which are to follow made more easy.

§ 104 *b*. **How the Chapter divided.** — We shall consider, I. The Nature and History of the Distinction; II. What Particular Marriages are Voidable, and what Void; III. Effect of a Voidable Marriage, and of its Dissolution; IV. Something of English and American Statutes relating to this Subject.

I. *The Nature and History of the Distinction.*

§ 105. **Definitions — What Marriages in General Voidable, and what Void.** — A marriage is said to be void, when it is good for no legal purpose, and its invalidity may be maintained in

any proceeding, in any court, between any parties, whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly or collaterally.[1] A marriage is said to be voidable, when the imperfection can be inquired into only on a proceeding conducted for the purpose of setting it aside, during the lifetime of both the husband and wife.[2] Until set aside, it is practically valid; when set aside, it is rendered void from the beginning.[3] In the absence of modern statutes which have more or less modified the original doctrines of the unwritten law, the canonical impediments to marriage, such as consanguinity, affinity, and impotence, render it merely voidable; the civil impediments, such as a prior marriage, idiocy, and the like, usually render it void.[4]

§ 106. **Importance of Historical View — Ecclesiastical Courts — Prohibition — Distinction between Canonical and Civil Impediments.** — In the discussion of the subject of this chapter, we shall find it necessary to look a little at the history of the distinction we are considering; because, as already observed, though the division of things into void and voidable extends into other departments of our jurisprudence, it is not anywhere else governed by the same rules as here, and the reason of the rules here governing can be fully seen only in the light of their history. When, in ancient times, the ecclesiastical courts of England decided causes upon laws derived from the See of Rome and the councils of the church,[5] the common-law judges were presumed to have no knowledge of those peculiar laws; and so, if a marriage (a thing of ecclesiastical control) was celebrated, they could do no otherwise than hold it valid, since in theory they knew nothing of the legal rules entering

[1] Shelford Mar. & Div. 479, 480; Wilson *v.* Brockley, 1 Phillim. 132; Ferlat *v.* Gojon, Hopkins, 478, 493; Hantz *v.* Sealy, 6 Binn. 405; Gathings *v.* Williams, 5 Ired. 487; Hemming *v.* Price, 12 Mod. 432; Patterson *v.* Gaines, 6 How. U. S. 550, 592; Fornshill *v.* Murray, 1 Bland, 479; Mount Holly *v.* Andover, 11 Vt. 226; Rawdon *v.* Rawdon, 28 Ala. 565; Middleborough *v.* Rochester, 12 Mass. 363; Higgins *v.* Breen, 9 Misso. 493; Smart *v.* Whaley, 6 Sm. & M. 308.

[2] Shelford Mar. & Div. 483, 484; 1 Bl. Com. 434; Bonham *v.* Badgley, 2 Gill, 622.

[3] Ib.; Perry *v.* Perry, 2 Paige, 501; Aughtie *v.* Aughtie, 1 Phillim. 201.

[4] Shelford Mar. & Div. 154; 1 Bl. Com. 434; Rogers Ec. Law, 630, tit. Marriage; Elliott *v.* Gurr, 2 Phillim. 16, 1 Eng. Ec. 166, 168; Rex *v.* Wroxton, 4 B. & Ad. 640; Jaques *v.* The Public Administrator, 1 Brad. 499.

[5] Ante, § 51.

into the question.[1] As a consequence of this proposition, a prohibition would not lie, from the common law to the ecclesiastical tribunals, to prevent the latter from dissolving a marriage on the ground of canonical impediments.[2] And we may infer, that, in all cases in which the question of the validity of a marriage arose in the common-law courts, and was not referred for decision to the spiritual,[3] the marriage was held to be good, unless some civil impediment were shown.

§ 107. **Church enlarging the Impediments — Affinity by mere Carnal Knowledge, &c.** — But the law of the church became gradually burdensome to the people. The impediments to marriage were greatly extended; and consanguinity and affinity, even to the seventh degree of the canonical reckoning, which might embrace the fourteenth degree of the civil law, were at one time made obstructions to the nuptials; though marriages in the fourth canonical degree, contracted between infidels who were afterward converted, were not dissolved.[4] And an affinity, nearly equivalent to consanguinity, was also created by sexual intercourse without marriage; in consequence of which a person guilty of fornication could not marry one related to the *particeps criminis* within a certain part of the prohibited degrees.[5] These impediments seemed not the

[1] The point of the text is pithily illustrated in the following words, extracted from a letter of his Holiness the Pope, to the King of Sardinia, dated Sept. 19, 1852. "There would be," he says, "a veritable usurpation over the legitimate power, if the civil law were to pretend to know and judge cases in which the sacrament of marriage has been, or has not been, regularly celebrated by the church." See Parl. Rep. of Div. Com. pub. 1853, p. 77.

[2] Harrison *v.* Burwell, Vaugh. 206, 207, 213.

[3] The State *v.* Banfort, 2 Rich. 209; Poynter Mar. & Div. 167.

[4] 4 Reeves Hist. Eng. Law, 58; Poynter Mar. & Div. 99 et seq.

[5] Rees Cyc. art. Marriage; Macqueen Parl. Pract. 476, 477; Swinb. Spousals, 238. In a modern Scotch case, this kind of affinity was denied. Hamilton *v.* Wyllies, 5 Scotch Sess. Cas. new ed. 668. The English legislation, as to this particular, varied from time to time during the reign of Henry VIII., to suit the varying domestic relations of this monarch, as follows: Stat. 25 Hen. 8, c. 22, entitled "An Act concerning the King's Succession," after directing within what degrees marriages shall be disallowed, has this clause: § 14, "Provided always, that the article in this act contained concerning prohibitions of marriages within the degrees aforementioned in this act, shall always be taken, interpreted, and expounded of such marriages, where marriages were solemnized and carnal knowledge was had," — thus excluding, the reader perceives, the affinity created by mere sexual commerce. But three years later, the legislative and kingly judgment on this question was found to be in complete

less burdensome to the more conscientious class of the people; though, as an offset, they were often made the means of dissolving uncongenial marriages, indissoluble still by the general ecclesiastical law. Persons within the prohibited degrees might be permitted to marry, on cause shown, by special dispensations, the granting of which is said to have brought revenue to the church.[1]

§ 108. **Stat. 32 Hen. 8.** — In these circumstances came Stat. 32 Hen. 8, c. 38, which lies at the foundation of the distinction of void and voidable in marriage. It was soon after its enactment repealed, so far as concerns precontract, but in its other parts it still remains as the foundation of the marriage law of England; and there is no reason why it should not be accepted by us, though perhaps not encumbered with all the English interpretations, as entering into the common law of this country. After reciting[2] in the preamble, that theretofore "the usurped power of the bishop of Rome" had made in marriage "that unlawful which by God's word

harmony with the ecclesiastical; for Stat. 28 Hen. 8, c. 7, entitled also "An Act concerning the Succession to the Crown," after directing, like the previous one, within what degrees marriages should not be celebrated, provided, § 10, "that, if it chance any man to know carnally any woman, that then all and singular persons, being in any degree of consanguinity or affinity as is above written to any of the parties so carnally offending, shall be deemed and adjudged to be within the cases and limits of the said prohibitions of marriage." This latter statute was afterward, in part at least, repealed; but, as late as 1861, there was a case decided by the Matrimonial Court in England, wherein a man sought to avoid his marriage, and to have a decree of nullity pronounced, because, before its celebration, he had carnally known his wife's mother. Learned counsel contended on his behalf, that Stat. 28 Hen. 8, c. 7, was, as to the part above quoted, and some other parts, revived subsequently to the repeal, or, if it was not, that the doctrine of the statute should be incorporated by construction into 32 Hen. 8, c. 38. This argument was based on a very respectable show of authority, but the judge overruled it, and declined to pronounce the marriage void. Cresswell, the judge ordinary, stated the conclusion of the court to be, "that the 28 Hen. 8, c. 7, was repealed and has not been revived, and that the 32 Hen. 8, c. 38, gives the rule by which we are to judge whether parties may lawfully marry or not; and that rule is, 'That all persons be lawful that be not prohibited by God's law to marry; and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees.' The prohibitions described in the 18th chapter of Leviticus seem to us to assume, that marriage is necessary to create the degree of affinity which makes a subsequent marriage unlawful on the ground of affinity." Wing *v.* Taylor, 2 Swab. & T. 278, 297.

[1] 4 Reeves Hist. Eng. Law, 59; Ayl. Parer. 364. See also the preamble to Stat. 32 Hen. 8, c. 38.

[2] See post, § 112, note.

'is lawful," — that many married persons, after cohabitation and the birth of children, had been divorced for precontract, — that "by reason of other prohibitions than God's law admitteth, ... as in kindred or affinity between cousin-germans, and so to fourth and fourth degree, [and in] carnal knowledge of any of the same kin or affinity before in such outward degrees, which [marriages] else were lawful, and be not prohibited by God's law," many married persons had been divorced, — that "marriages have been brought into such an uncertainty thereby that no marriage could be so surely knit and bounden but it should lie in either of the parties' power and arbiter, casting away the fear of God, by means and compasses to prove a precontract, a kindred, and alliance, or a carnal knowledge, to defeat the same, and so under the pretence of these allegations afore rehersed to live all the days of their lives in detestable adultery," — it enacts, "That from the first day of the month of July next coming, in the year of our Lord fifteen hundred and forty, all and every such marriages as within this Church of England shall be contracted between lawful persons (as by this act we declare all persons to be lawful that be not prohibited by God's law to marry), ... shall be . . . . deemed, judged, and taken to be lawful, good, just, and indissoluble, notwithstanding any precontract or precontracts [1] of matrimony not consummate with bodily knowledge, &c. And that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees. And that no person, &c. shall, &c. be admitted in any of the spiritual courts . . . . to any process, plea, or allegation, contrary to this aforesaid act." [2]

§ 109. **Ecclesiastical and Temporal Jurisdictions.** — Now the temporal courts were always supposed able to understand, and so they could always construe, any act of Parliament to whatever subject it might relate. We have seen [3] also, that they

[1] "This statute was repealed as to precontracts by the 2 & 3 Edw. 6, c. 23, but in all other respects confirmed." Cresswell, J. in Wing *v.* Taylor, 2 Swab. & T. 278, 295. See post, § 113, note.

[2] See 2 Inst. 684; Gibs. Cod. 411. There were some other statutes concerning marriage, in respect to consanguinity and affinity, passed both before and after Stat. 32 Hen. 8, c. 38; but they are neither important, nor material to the point here presented. See Shelford Mar. & Div. 163 et seq.

[3] Ante, § 50.

had authority to restrain by prohibition the spiritual tribunals, when the latter undertook to exercise a jurisdiction beyond their proper limits. Therefore the result of the above statute of Henry VIII. was, to authorize the temporal courts to interfere by prohibition, whenever the spiritual attempted to impeach a marriage *without* the Levitical degrees; that is, one not forbidden by "God's law."[1] But it gave them no new power to interfere when the marriage was *within* those degrees; for it was silent as to whether parties within those degrees might marry or not.[2] Consequently the temporal courts did not, subsequently to this statute more than before,[3] undertake to say a marriage was void by reason of consanguinity, affinity, or other canonical impediment, not being without the Levitical degrees. Perhaps they might have held it void, if incestuous according to the law of nature.[4] But they did restrain the spiritual tribunals, whenever, after the death of one of the parties, they undertook to declare a marriage null by reason of any canonical infirmity; because, they said, it would bastardize and disinherit the issue, who could not so well defend themselves as the parties might have done; yet still they allowed the spiritual tribunals to proceed criminally against the living offender, for the incest only.[5]

§ 110. **Continued — The Result.** — If the reader will here pause, he will see that these two jurisdictions, the temporal and the spiritual, proceeding as we have described after the enactment of Stat. 32 Hen. 8, c. 38, must necessarily have produced, where there was a canonical impediment, precisely what we have termed the voidable in marriage. For, in the flexible forms of procedure used in the ecclesiastical courts, whenever, during the lifetime of both the parties, any inquiry into the validity of a marriage arose there, the inquiry took at once the character of a suit for nullity; since this suit need neither be instituted nor carried on by one of the parties to

[1] Shelford Mar. & Div. 166; 1 Woodd. Lect. 250; Harrison *v.* Burwell, Vaugh. 206.

[2] Butler *v.* Gastrill, Gilb. Ch. 156. The citation, in the report of this case, of Stat. 38 Hen. 8, c. 13, is doubtless a misprint for Stat. 32 Hen. 8, c. 38, there being no such statute as the former.

[3] Ante, § 106.

[4] Post, § 117, 376.

[5] Ray *v.* Sherwood, 1 Curt. Ec. 193, 199; 2 Inst. 614; Hinks *v.* Harris, Carth. 271, 2 Salk. 548.

the marriage, it being equally maintainable by any person having an interest in the question.[1] Even in a criminal prosecution before the ecclesiastical judge for incest, in which the office of the judge could be promoted by any one, the marriage would be declared null.[2] When, on the other hand, the question of the validity came before the lay tribunals, as it might do collaterally but never directly, if an impediment of the canonical kind were alleged against it, those tribunals having theoretically no knowledge of the canonical law, and having no jurisdiction to inquire into the impediment, could not therefore regard the marriage void by reason of the impediment; and so, the fact of marriage appearing, they held it, for the purposes of the trial, to be good. And if the spiritual courts undertook to dissolve a marriage for such an impediment after one of the parties was dead, the temporal restrained them by prohibition; while they permitted them to proceed in the suit for nullity during the life of the parties. That is, merging all considerations of different tribunals, if the matter was agitated while both parties were living, in what was originally, or by the forms of procedure became, a suit for nullity, the marriage was pronounced void; if in any other form during their life, or in any possible form after the death of one of them, the marriage was held to be good; and this course of things coincides in effect with the definition we have already given of a voidable marriage.[3] If the temporal courts had possessed the jurisdiction to decide upon the canonical infirmities, those infirmities, like the civil, would have rendered the marriage void. And hence the rule,[4] that the canonical impediments render the marriage voidable, and the civil render it void.

§ 111. **Result, continued — How in Scotland — (Further Views,** in the Note). — This distinction of void and voidable, unknown to the ancient common law of England,[5] but established thus as the mere result of the action of the two jurisdictions, became soon crystallized into the law as a part of

[1] Ray *v.* Sherwood, 1 Curt. Ec. 173, 193, 1 E. F. Moore, 353.

[2] Woods *v.* Woods, 2 Curt. Ec. 516, 529, 7 Eng. Ec. 181, 187; Chick *v.* Ramsdale, 1 Curt. Ec. 34.

[3] Ante, § 105.

[4] Ante, § 105.

[5] Ray *v.* Sherwood, 1 Curt. Ec. 193, 199.

the common law itself;[1] and to it the ecclesiastical courts as well as those of the common law yielded; making it therefore a doctrine equally respected in all the tribunals.[2] In Scotland, where this cause has not operated, such a distinction is said to be unknown;[3] yet this has been doubted there, and it seems not to be clear, whether, in the case of impotence in one of the parties to a marriage, the other is entitled to enter into a second marriage without having the first declared null.[4]

[1] The ancient common law is now partially restored in England by recent statutes. Rogers Ec. Law, 2d ed. 635; post, § 119.

[2] Elliott *v.* Gurr, 2 Phillim. 16, 1 Eng. Ec. 166, 169.

[3] Shelford Mar. & Div. 86; Wadd. Dig. 223, note.

[4] 1 Fras. Dom. Rel. 81; Masterton's Case, 1 Swinton, 427. Much confusion has existed in the minds of judges not familiar with the history recorded in our text, concerning this distinction of void and voidable in marriage. Therefore it is perhaps desirable to clear the matter still further, by correcting a misapprehension which appears in an opinion of a very able and learned judge of the North Carolina court. In the case of Gathings *v.* Williams, 5 Ire. 487, Ruffin, C. J. observed: "There is a distinction in the law between void and voidable marriages, where even they were regularly solemnized. The latter, which are sometimes called marriages *de facto*, are such as are contracted between persons who have capacity to contract marriage, but are forbidden by law from contracting with each other; as to which, therefore, there was a jurisdiction in the spiritual courts to declare the nullity of the marriage. But until the nullity was thus declared, as an existing marriage it was recognized as valid both in the canon and common law; and, as there can be no proceeding in the ecclesiastical court against the parties after their death, or that of one of them, that event virtually makes the marriage good *ab initio* to all intents, and the wife and husband may have dower and curtesy, and the issue will be legitimate. Co. Lit. 32, 33. But where the marriage is between persons one of whom has no capacity to contract marriage at all, — as where there is a want of age or understanding, or where a prior marriage is still subsisting, — the marriage is void absolutely and from the beginning, and may be inquired into in any court." Now this statement of the matter is inaccurate in several respects. For example, there was plainly no rule of the ancient ecclesiastical law against declaring a marriage void for canonical impediments after the death of the parties; since in fact the ecclesiastical courts undertook to do so, and were only restrained by prohibitions from the temporal, which prohibitions furnished matter of bitter complaint by the ecclesiastical judges; Ray *v.* Sherwood, 1 Curt. Ec. 193, 199; 2 Inst. 614; Harris *v.* Hicks, 2 Salk. 548; though at length, as we saw in the text, these judges yielded. Moreover, it is hardly accurate to say that a marriage is void where one of the parties to it has no capacity to contract marriage at all, and voidable where there is no capacity to contract with each other. A person physically impotent has no capacity to marry at all, yet his marriage is voidable, not void, impotence being a canonical impediment; and where, as in Scotland, the guilty party after a divorce is forbidden by law to marry with the *particeps criminis*, there is merely an incapacity in the parties to contract with each other, yet a marriage between them is evidently void, not voidable. See Cox *v.* Combs, 8 B. Monr. 231; Berkshire *v.* The State, 7 Ind. 389.

II. *What Particular Marriages are voidable and what void.*

§ 112. **Canonical Disabilities — Consanguinity, &c. — Impotence — Precontract.** — The canonical disabilities, as already seen, render the marriage voidable, not void.[1] This rule has no exceptions, other than have been created by statutes. These disabilities are physical impotence, and consanguinity and affinity.[2] They will be further considered in other connections. Perhaps also the antiquated impediment of precontract may be reckoned as canonical. That was where one of the parties to a marriage was under a prior agreement to marry a third person; or where one of them had already married a third person, but not according to the forms required by the ecclesiastical law. The ecclesiastical tribunals, in such a case, would compel the celebration of the prior undertaking in due form, and pronounce the other marriage, though the first duly celebrated, void from the beginning. But, until thus avoided, it was good; or rather, it was certainly good when the precontract was a mere executory agreement to marry; possibly, not certainly, when it had even been followed by words of present consent or by copula.[3] But this entire

[1] Ante, § 105.

[2] Elliott *v.* Gurr, 2 Phillim. 16, 1 Eng. Ec. 166; Withipole's Case, cited in Howard *v.* Bartlet, Hob. 181; Rennington *v.* Cole, Noy, 29; A. *v.* B., Law Rep. 1 P. & M. 559.

[3] Baxtar *v.* Buckley, 1 Lee, 42, 5 Eng. Ec. 301; Lord Campbell, in Reg. *v.* Millis, 10 Cl. & F. 534, 763, 784. Lord Denman, in this latter case, p. 815, expressed the opinion, in opposition to Lord Campbell, that the matrimonial contracts of which the ecclesiastical courts enforced the specific performance were contracts *per verba de præsenti* only, a point apparently contradicted by the recitations of facts in Stat. 32 Hen. 8, c. 38. And see Scrimshire *v.* Scrimshire, 2 Hag. Con. 395, 4 Eng. Ec. 562, 564. According to Swinburne, whose authority can hardly be disputed on such a point, the party refusing to celebrate the marriage might be proceeded against in the ecclesiastical court, whether the espousals were *per verba de præsenti*, or *per verba de futuro*. But in the latter case, if the defendant had already entered into a marriage duly solemnized with another person, a specific performance of the contract would not be required, so as to annul such marriage [see, however, the above-recited Stat. of Hen. 8]; and, even if he had not, the court would not proceed to the *significavit* against him, on his refusing to celebrate a marriage with the plaintiff, but would only punish him for the contempt. On the other hand, if the espousals were *per verba de præsenti*, or *per verba de futuro cum copula*, the subsequent marriage with any other person would be annulled; the defendant would be required publicly to solemnize his marriage with the plaintiff, and be enjoined penance; and, on refusal, would be excommunicated, and imprisoned by writ out of chancery, until compliance was effected. Swinb. Spousals, 85, 223, 226, 231, 232, 239. See also

matter of precontract, as an impediment to marriage, belongs to another branch of our discussion.[1] When the precontract is such as to amount to a perfect marriage, though not celebrated in due form, it ought, in all propriety, to render the second marriage void, even without judicial sentence. When it does not amount to a marriage, there is, in this country, no judicial power which can command the celebration, or command cohabitation; therefore it cannot, with us, constitute an impediment to the marriage afterward attempted.

§ 113. **Marriage after Fraudulent Divorce — Vacated.** — If the practice of the courts in Pennsylvania and some other of our States, whereby sentences for divorce, even after a second marriage and issue born, are vacated for fraud, — a matter to be considered in another part of these volumes,[2] — is to be deemed established American law, then we have, as they would seem to have in England, another kind of voidable marriage; though the impediment rendering it such can hardly be deemed

Holt *v.* Clarencieux, 2 Stra. 937. The before-mentioned Stat. 32 Hen. 8, c. 38 (see ante, 108), abolished the impediment of precontract, except when *copula* had followed; but this branch of the statute was shortly afterward repealed by Stat. 2 & 3 Edw. 6, c. 23. Still later however — too late to be matter of any consideration when we are inquiring after our unwritten law — Stat. 4 Geo. 4, c. 76, § 27, provided, "That in no case whatsoever shall any suit or proceeding be had in any ecclesiastical court, in order to compel a celebration of any marriage *in facie ecclesiæ*, by reason of any contract of matrimony whatsoever, whether *per verba de præsenti*, or *per verba de futuro*, any law or usage to the contrary notwithstanding." See Rogers Ec. Law, 2d ed. 645; Shelford Mar. & Div. 164. But as Stat. 2 & 3 Edw. 6, c. 23, is of a date sufficiently early to demand our consideration when we are inquiring after the unwritten law of this country, I will transcribe here, in full, the second section: "That as concerning precontracts the said former statute [32 Hen. 8, c. 38] shall from the first day of May next coming cease, be repealed, and of no force or effect, and be reduced to the estate and order of the king's ecclesiastical laws of this realm, which immediately before the making of the said estatute in this case were used in this realm: so that, from the said first day of May, when any cause or contract of marriage is pretended to have been made, it shall be lawful to the king's ecclesiastical judge of that place to hear and examine the said cause; and (having the said contract sufficiently and lawfully proved before him) to give sentence for matrimony, commanding solemnization, cohabitation, consummation, and tractation, as becometh man and wife to have, with inflicting of all such pains upon the disobedients and disturbers thereof, as in times past before the said statute the king's ecclesiastical judge by the king's ecclesiastical laws ought and might have done, if the said statute had never been made; any clause, article, or sentence of the said statute to the contrary in any wise notwithstanding." The date of this enactment is 1548.

[1] Post, § 272.

[2] Vol. II. § 753, 760, 763.

canonical. This impediment is stated by Gibson as follows: "In like manner do the books of common law resolve, in case of a divorce *a vinculo* for *impotency*, after three years' trial and examination, and sentence in the spiritual court for the perpetual impotency of generation. As it was in Bury's Case,[1] who was so divorced, but afterwards married another wife, and had children by her; upon which it was urged, that, the church being evidently deceived as to his perpetual impotency, the divorce thereupon was null; and, if so, that the second marriage was unlawful and the issue illegitimate. But the court resolved, that, since there had been a divorce for frigidity or impotence, it was clear that each of them might lawfully marry again; and, though it should be allowed, that, the church appearing to have been deceived in the foundation of their sentence, the second marriage was voidable, yet, till it should be dissolved, it remained a marriage, and the issue during the coverture lawful."[2] But, as already intimated, the more full consideration of this question is reserved for another place.

§ 114. **Statute authorizing Marriage after Absence unheard of — Void at first — Good after a certain Period.** — A statute also — clearly a civil impediment — may so operate as to cause the marriage to be voidable, in distinction from void. Thus a New York statute,[3] the language of which in substance is, that a second marriage, contracted in good faith when the former husband or wife has absented himself or herself for the space of five successive years without being known to the other party to be living during that period, shall be voidable merely, and shall only be considered as void from the time when its nullity shall be decreed by a court of competent authority, — is construed to make a second marriage, entered into under

[1] Bury's Case, 5 Co. 98; Kenn's Case, 7 Co. 42.

[2] Gibs. Cod. 446; 2 Burn Ec. Law, Phillim. ed. 501; Morris *v.* Webber, 2 Leon, 169. "If the parties should be divorced," on the ground of impotence, "and both should have children by the second marriage, these second marriages must be by law set aside, and the first marriage declared valid; for, when the church appears to have been deceived, the sentence must be revoked." Welde *v.* Welde, 2 Lee, 580, 586. But see the observations of Sir John Nicholl, in Norton *v.* Seton, 3 Phillim. 147, 1 Eng. Ec. 384, 388, where he says, "What a state to place the parties in! This is something in the text law which I cannot readily assent to belong to the law of England."

[3] 2 R. S. 139, § 6.

the circumstances thus pointed out, valid in law until dissolved. The absent husband or wife, returning, cannot rely on the cohabitation had under this second marriage, as being adultery, authorizing a dissolution of the first, unless indeed it is continued after this second marriage is made void by judicial sentence; and, until such sentence, the parties to it are justified in their cohabitation; nor, till then, is cohabitation under the first marriage permissible.[1] And, after the death of one of the parties, the marriage is, for purposes of administration and succession, good.[2] But the reader will observe, that the sentence annulling this second marriage differs materially in effect from a sentence annulling a marriage voidable for a canonical defect; because it renders void the marriage only from the time it is pronounced void, while the sentence for the canonical defect renders it void from the beginning. In like manner, the Irish statute of 9 Geo. 2, c. 11, provides, "that any marriage of a person under twenty-one years, without the consent of the father or guardians, shall be void; but, if no suit be commenced within one year after the marriage, it shall be good." And this statute creates a peculiar kind of voidable marriage.[3]

§ 115. **Other Civil Impediments — Insanity — Want of Age, &c.** — The remaining impediments are likewise civil; "such as prior marriage, want of age, idiocy, and the like;"[4] and they are said to render the marriage void, not voidable.[5] These impediments will also be particularly considered in chapters further on. But though they are thus said to render the marriage void, not all of them render it strictly so, but some of them make it void only as contrasted with the peculiar quality of voidable considered in this chapter, while in the sense in which the word is used in other departments of the law it is voidable. We shall even see, that "want of age,"[6] on account of which the union becomes what is termed an "inchoate marriage," produces substantially the same effect as a canon-

[1] Vallean *v.* Valleau, 6 Paige, 207; Cropsey *v.* McKinney, 30 Barb. 47.

[2] White *v.* Lowe, 1 Redfield, 376; Wyles *v.* Gibbs, 1 Redfield, 382.

[3] Rex *v.* Jacobs, 1 Moody, 140; Rex *v.* Roirdan, Car. Crim. Law, 3d ed. 255.

[4] Sir John Nicholl, in Elliott *v.* Gurr, 2 Phillim. 16, 1 Eng. Ec. 166.

[5] Ante, § 105.

[6] Post, § 143 et seq.

ical disability; the chief difference being, that in the one case the act of the parties alone is sufficient to undo the bond, while in the other the courts must interpose. And in cases of fraud and the like, where there is truly a want of consent, while the forms of solemnization have been had, — though the marriage is a nullity, as much as a deed not delivered, until the consent is given, — yet, if the consent is given after the ceremony is performed, it need not be repeated.[1]

III. *Effect of a Voidable Marriage, and of its Dissolution.*

§ 116. **General Doctrine — Children — Administration — Divorce — Polygamy — As Foundation for Divorce Suit.** — The doctrine seems to require no qualification, that a voidable marriage is, until the act or sentence transpires which renders it void, as good to every intent as if it contained no infirmity. Thus the children are legitimate,[2] the husband is entitled to administer on the estate of the deceased wife,[3] the wife surviving him is entitled to dower,[4] an indictment for polygamy may be maintained if a second marriage is had,[5] husband and wife may levy a fine,[6] and so of all the other consequences of marriage. It was, however, held in the ecclesiastical courts of England, that a defendant in a suit for divorce could plead the voidability of the marriage by reason of a canonical defect;[7] but this was owing to the method of procedure in those courts, whereby this party is permitted, by his responsive allegation, to make himself substantially a plaintiff, in a manner somewhat corresponding to a cross action at the common law. If he did not thus plead the voidability of the marriage, the judgment in the divorce suit, it seems, affirmed the marriage, and it could not be avoided afterward.[8]

§ 117. **Parties to Voidable Marriage changing Domicil.** —

[1] Post, § 214, 215.

[2] 2 Burn Ec. Law, Phillim. ed. 450, tit. Marriage; Bury's Case, 5 Co. 98.

[3] Elliott *v.* Gurr, 2 Phillim. 16, 1 Eng. Ec. 166.

[4] Rennington *v.* Cole, Noy, 29; 1 Bl. Com. 434 and note.

[5] The State *v.* Moore, 3 West. Law Jour. 134; Rex *v.* Jacobs, 1 Moody, 140; 1 East P. C. 466; Reg. *v.* Burke, 3 Crawf. & Dix C. C. 96.

[6] Sabell's Case, 2 Dy. 178 *b*.

[7] Guest *v.* Shipley, 2 Hag. Con. 321, 4 Eng. Ec. 548; Rogers Ec. Law, 361. See Anonymous, Deane & Swabey, 295.

[8] Guest *v.* Shipley, supra. And see Williams *v.* Dormer, 16 Jur. 366, 9 Eng. L. & Eq. 598.

Where the parties to a voidable marriage transfer their domicil to another State or country, the marriage is good in the new locality, at least until set aside. Thus a man in England having married his mother's sister, in 1834, before Stat. 5 & 6 Will. 4, c. 54, rendered such a marriage void, removed to Massachusetts, the statute of which State declares this kind of matrimonial connection to be void; and the Massachusetts court, not deterred by the Massachusetts statute, held this particular marriage to be good, on the well-known principle, that marriages valid by the law of the country where celebrated are valid everywhere. But Hubbard, J., who delivered the opinion, remarked: "There is an exception to this principle, in those cases where the marriage is considered as incestuous by the law of Christianity, and as against natural law. And these exceptions relate to marriages in the direct lineal line of consanguinity, and to those contracted between brothers and sisters; and the exceptions rest on the ground, that such marriages are against the laws of God, are immoral and destructive of the purity and happiness of domestic life. But I am not aware that these exceptions, by any general consent among writers upon natural law, have been extended further, or embraced other cases prohibited by the Levitical law."[1] This matter, however, will be further considered in a subsequent chapter.[2]

§ 118. **Effect of annulling Voidable Marriage.** — The doctrine is a broad one, that, when a voidable marriage is set aside by a decree of nullity, the parties are then considered as having never been married. The children, for example, who were before legitimate, become by force of the decree illegitimate; and the late husband is treated as having never acquired any right to the property of the wife, though the claims of third persons are to some extent protected. But we shall examine this doctrine more minutely when we come to consider the consequences of a divorce.[3]

[1] Sutton *v.* Warren, 10 Met. 451. And see Hiram *v.* Pierce, 45 Maine, 367; Brook *v.* Brook, 9 H. L. Cas. 193, the doctrine of which latter case, however, is not the American doctrine. Post, § 379–389.

[2] Post, § 348 et seq.

[3] Vol. II. § 690–696.

IV. *Something of English and American Statutes relating to this Subject.*

§ 119. **Stat. 5 & 6 Will. 4 — How in our States.** — By Stat. 5 & 6 Will. 4, c. 54, a great change was introduced into this part of the English marriage law. That statute went into operation on the 31st of August, 1835. It forbade the institution of any new proceeding to annul a marriage, already solemnized, within the prohibited degrees of *affinity* (not including consanguinity); and provided, that all marriages afterward solemnized within the prohibited degrees either of consanguinity or affinity should be void.[1] Yet it did not prevent the punishment, by the spiritual courts, of persons who had previously contracted marriage within the degrees of affinity prohibited.[2] In the United States generally, these matters are regulated by statutes. Probably, in most of them, marriages within the degrees prohibited are by the statutes void, instead of voidable.

§ 120. **Construction of the Statutes — Prior Law — Polygamous Marriages — Incestuous.** — It may not in all cases be palpable, from the words of a statute, whether it is intended to render the marriage it forbids voidable or void.[3] The common law upon this subject, in all the States governed by that law, is probably the same as it was in England previous to Stat. 5 & 6 Will. 4, c. 54.[4] And the question upon the con-

[1] Burgess *v.* Burgess, 1 Hag. Con. 384, 392; Reg. *v.* Chadwick, 12 Jur. 174, 11 Q. B. 173, 205; Brook *v.* Brook, 9 H. L. Cas. 193; post, § 378, 382.

[2] Ray *v.* Sherwood, 1 Curt. Ec. 193, 202.

[3] And see ante, § 89–95.

[4] In Wightman *v.* Wightman, 4 Johns. Ch. 343, 347, and 2 Kent Com. 83, Chancellor Kent seems of opinion, that the statute of Henry VIII. (ante, § 108) is not common law in this country; and that so, in the absence of controlling statutory provisions, we fall back upon the law of nature. This view, if entertained by this learned jurist, evidently arose partly from his omitting to consider what was the common law of England previous to the statute. If we do not adopt the statute, clearly we do not fall back upon the law of nature, but upon the older common law, wherein the prohibitions to marriage were extended much further than under the statute (ante, § 107). Therefore, as the statute was a great remedial measure, plainly there is no room to doubt that our ancestors brought with them the common law, not as it stood anciently, but as it was modified thereby. But what appears conclusive of this question is, that the distinction of void and voidable marriages is well established in the United States, recognized by Chancellor Kent himself (2 Kent Com. 95); and that, as we have seen, it rests entirely on this statute of Henry VIII.

struction of every statutory provision must necessarily be, whether it was intended to alter the common law. An Ohio enactment having made it ground of divorce "where either of the parties had a former husband or wife living at the time of solemnizing the second marriage," the court held, that its effect was, not to make the polygamous marriage voidable, but void.[1] In Illinois, a provision that males of the age of seventeen, and females of the age of fourteen, might be joined in marriage if "not prohibited by the laws of God," was construed, in a case supposed to be prohibited by the laws of God, namely, that of the marriage of a man with the daughter of his sister, to render the marriage voidable only; in consequence of which it could not be set aside after the death of one of the parties.[2]

CHAPTER VII.

GENERAL VIEW OF THE ESSENTIALS ENTERING INTO A VALID MARRIAGE.

§ 121. **Consent the Essence of Marriage — Consequences.** — We saw, in the foregoing discussions, that through all the law of marriage runs the principle which puts it in the power of parties to assume or not, at their own election, the matrimonial status, while the status is imposed upon no one who does not accept it voluntarily. In other words, the condition of marriage is entered into through, and only through, the

At first, I was led by his suggestion to inquire, whether the true doctrine is not that this statute has never been received here; and that, therefore, the distinction of void and voidable in marriage does not exist in this country. But the difficulty is, that for such a scepticism there is no foundation in any judicial opinion, or even intimation; and that it is opposed to some direct decisions, and to the entire current of the judicial atmosphere in this country, relating to this matter. Besides, the above statute falls fully within that general range of English statutes (Wilbur *v.* Tobey, 16 Pick. 177, 182; Bishop First Book, § 51, 52), which it is well settled belong to the common law of our several States.

[1] Smith *v.* Smith, 5 Ohio State, 32. See also Harrison *v.* Harrison, 1 Philad. 389; ante, § 96.

[2] Bonham *v.* Badgley, 2 Gilman, 622.

door of contract.[1] When, therefore, we search for those imperfections which may render void or voidable a supposed marriage, we are called upon only to examine a question of contract between the parties, or mutual consent, as defined by the law, with respect to this particular subject. There must be, in the first place, the consenting mind; in the second place, the mind must give its consent in fact; there must be, in the third place, suitable parties whom the law permits to marry, not only in general, but with each other; and, in the fourth place, there must concur all the other facts which have been made legally essential, — it is not necessary here to explain what they are.

§ 122. **Course of this Discussion — Why.** — Now, the pages of this book are intended for perusal and use in different localities, where differing laws prevail. It will be necessary therefore that we consider, more or less minutely, all the various impediments, some of which are universal, others are local. And this course is essential to the completeness of the work, even as a work to be consulted only in places where but a part of the impediments are known to the local law. For we shall see, by and by, that marriage is in general to be tested, as being valid or not, by the law of the place in which it is entered into; therefore, in a country like ours, the populations of whose States consist of persons who were married in all parts of the world, a very large proportion of all the marriages to be dealt with being foreign marriages, the several States being foreign to one another within the meaning of the marriage law, — the practitioner needs to be instructed concerning the general doctrines everywhere prevailing on this subject, and concerning local laws other than his own, quite as much as concerning his own local laws.

§ 123. **Continued.** — Let us, therefore, in successive chapters, bring to view the various impediments to marriage; creating in it, when celebrated, imperfections differing in kind and degree. Let us consider what ones of these impediments are local and what are general, and the particular effect of each. In this connection we shall also inquire, what are the formal ceremonies, and what is the mutual consent, essential

[1] Ante, § 3, 12, 19, 93–95.

to marriage. Then, in a subsequent chapter, closing this part of our discussions, we shall take a view of the conflict of laws relating to marriage; wherein the effect of marriages celebrated abroad, or in other States than our own, will be considered, together with various minor topics, collateral to this main inquiry. The particular order of the discussion will appear as it progresses.

CHAPTER VIII.

WANT OF MENTAL CAPACITY.

§ 123 *a*. **How the Chapter divided.** — The doctrine of this chapter is, that, as there can be no marriage without the consent of the mind,[1] so there can be no matrimonial consent without mental capacity. We shall, therefore, consider, I. The Subject in its General Aspect; II. Particular Applications of the General Doctrine; III. Confirmation by Cohabitation, and whether the Marriage is Void or Voidable.

I. *The Subject in its General Aspect.*

§ 124. **General Doctrine.** — The doctrine of this chapter, therefore, is, that, in order to constitute the mutual consent to marry, out of which the law creates the status of marriage, there must be in both of the parties a consenting mind, — in other words, neither of them should be idiotic or otherwise insane. This is but a doctrine common in the law of contracts, and it as thoroughly pervades the matrimonial law as any other department of our jurisprudence.[2]

[1] Ante, § 121.

[2] Portsmouth *v.* Portsmouth, 1 Hag. Ec. 355, 3 Eng. Ec. 154, 156; Jenkins *v.* Jenkins, 2 Dana, 102; Crump *v.* Morgan, 3 Ire. Eq. 91; Foster *v.* Means, 1 Speers Eq. 569; Fornshill *v.* Murray, 1 Bland, 479; Turner *v.* Meyers, 1 Hag. Con. 414, 4 Eng. Ec. 440; Browning *v.* Reane, 2 Phillim. 69, 1 Eng. Ec. 190; Legeyt *v.* O'Brien, Milward, 325,

§ 125. **Exploded Ancient Doctrine — The Modern Doctrine stated.** — Anciently the marriage of persons of unsound mind was supposed to be valid, — a conclusion, says Lord Stowell, "founded, I presume, on some notion that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character."[1] "A strange determination," remarks Blackstone, "since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to any thing. And, therefore, the civil law judged much more sensibly when it made such deprivations of reason a previous impediment; though not a cause of divorce, if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining, that the marriage of a lunatic, not being in a lucid interval, was absolutely void."[2] It matters not what the particular defect of reason is;[3] for the rule is general, that those who have not the regular use of their understanding, sufficient to deal with the common affairs of life, the difficulty being, not a mere weakness, but a derangement, or the weakness being so considerable as to amount to derangement, are incapable of entering into a valid marriage, or of making any other binding contract.[4]

§ 126. **Scope of this Discussion — As to Marriage, distinguished from other Contracts — General Views — Test of Insanity.** — The doctrine of insanity, as a broad and general one, extending through the entire field of our jurisprudence, cannot, of course, be discussed in the present chapter. What is to be done here will consist principally in calling the reader's attention to such adjudged points of the law as particularly con-

333; True *v.* Ranney, 1 Fost. N. H. 52; Ward *v.* Dulaney, 23 Missis. 410; Keyes *v.* Keyes, 2 Fost. N. H. 553; Rawdon *v.* Rawdon, 28 Ala. 565; Cole *v.* Cole, 5 Sneed, 57; Clement *v.* Mattison, 3 Rich. 93; Middleborough *v.* Rochester, 12 Mass. 363.

[1] Turner *v.* Meyers, 1 Hag. Con. 414, 4 Eng. Ec. 440, 441. It seems very remarkable, that even some American judges have latterly entertained the same idea of marriage being good, at the common law, celebrated between insane persons. Hamaker *v.* Hamaker, 18 Ill. 137; Park *v.* Barron, 20 Ga. 702. And see post, § 136–138.

[2] 2 Bl. Com. 438, 439; Crump *v.* Morgan, 3 Ire. Eq. 91, 96.

[3] 1 Bishop Crim. Law, 5th ed. § 379 and note. And see Ball *v.* Mannin, 3 Bligh, N. S. 1, 21, 1 Dow & Cl. 380, 391; Baxter *v.* Portsmouth, 5 B. & C. 170; Ex parte Barnsley, 3 Atk. 168, 171.

[4] Foster *v.* Means, 1 Speers Eq. 569, 574.

cern this question of marriage, in distinction from questions connected with ordinary contracts, and from questions testamentary, and the like. It is well known that judges are in the habit of applying somewhat different tests of insanity, according as the inquiry arises in one department or another of our law; thus, the capacity required to make a will is not deemed to be exactly the same as the capacity for entering into an ordinary contract, and neither of these capacities is the exact counterpart of the capacity to commit a crime.[1] And this distinction has its foundation both in the reason of the law and the facts of particular cases; yet, on the other hand, it is a distinction of a somewhat dangerous nature, requiring the courts to be careful not to carry it too far. So, as applied to cases of a like class, the rules and tests whereby the question of sanity or insanity is to be determined vary with the circumstances of the cases, if, indeed, each set of circumstances be not deemed to require its own particular tests and rules. Said Sir Herbert Jenner Fust, no longer ago than 1843: "It has frequently been attempted to furnish some general rules which might serve as guides to courts of law in the investigation and decision of cases of this description; but all endeavors to do so have failed; every case has some distinguishing features; each case must be governed by its own peculiar circumstances." [2] And since he pronounced these words, the world, both professional and non-professional, has grown still more enlightened, and has learned, that the phases of insanity, and of idiocy, and the like (the word "insanity," or the words "unsound mind," or the words, "want of mental capacity," covering severally, and alone, the whole idea), are as numerous in their developments of mental aberration as are the different phases of the sound mind prolific in unfolding sound mental phenomena. There is, therefore, no one test applicable to all forms of mental unsoundness, but each case must proceed more or less on a consideration of its particular facts.[3]

[1] Smith *v.* Tebbitt, Law Rep. 1 P. & M. 398, 400; Hancock *v.* Peaty, Law Rep. 1 P. & M. 335, 340, 341. And see Banks *v.* Goodfellow, Law Rep. 5 Q. B. 549, and various cases, some of them American, there cited.

[2] Mudway *v.* Croft, 3 Curt Ec. 671, 675.

[3] 1 Bishop Crim. Law, 5th ed. § 379, 381–396.

§ 127. **Test of Insanity as to Marriage.** — As applied to marriage, a sort of test of insanity has been held to be, to consider whether or not the party was capable of making a contract.[1] "If the incapacity be such," says Sir John Nicholl, "that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of his or her person and property by the matrimonial contract, any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract; though it may not be difficult, in most cases, to decide upon the result of the circumstances."[2] And Lord Stowell has observed: "Madness may subsist in various degrees; sometimes slight, as partaking rather of a disposition or humor, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held, by the common judgment of mankind, to affect his general fitness to be trusted with the management of himself and his own concerns."[3]

§ 128. **Continued.** — There is, on the other hand, a South Carolina case in which the court observed: "It appears to us, from the examination of Mrs. Frederick [the alleged insane person] by the commissioners, that another inquisition is not necessary. The answers given by her certainly show some understanding, although a defective one, and these afford

[1] Anonymons, 4 Pick. 32; Middleborough *v.* Rochester, 12 Mass. 363; Page on Div. 192, 193; Cole *v.* Cole, 5 Sneed, 57; Atkinson *v.* Medford, 46 Maine, 510. In Ward *v.* Dulaney, 23 Missis. 410, 414, 415, it was observed: "What degree of mental imbecility, what extent of intellectual aberration, will suffice to annul a contract of marriage, it is difficult to pronounce; certainly mere weakness of intellect, or even great eccentricity of conduct, unless it reaches a point that evinces inability to comprehend the subject-matter of the contract, will not suffice; and every principle of sound policy and humanity admonishes us, that a contract so important in its social relations, and bearing so materially on the peace and happiness of families, should not be set aside upon slight grounds, or on less proof than would suffice to annul contracts less sacred and important in their nature."

[2] Browning *v.* Reane, 2 Phillim. 69, 70, 1 Eng. Ec. 190, 191.

[3] Turner *v.* Meyers, 1 Hag. Con. 414, 4 Eng. Ec. 440, 442. In Foster *v.* Means, 1 Speers Eq. 569, is a statement of facts held to evidence such imbecility as disqualifies the party to contract matrimony.

higher evidence of the true state of her mind than the opinions of any witnesses on the subject could do. There may possibly be so much imbecility as to render her incapable of making contracts which would bind her estate, but this imbecility does not appear to exist in so great a degree as to incapacitate her from contracting marriage, which seems to be the chief object of the petitioner."[1] We may infer from this case, that, according to the opinion of the learned judges, a less degree of mental capacity will qualify a woman to dispose of her person and estate in marriage, than would be required as a qualification to dispose, by an ordinary contract, of her estate alone.[2] There may be doubt, whether either this South Carolina view or the view stated in our last section is exactly correct, as one of legal principle. The mental incapacity which disqualifies for crime is such as renders it impossible for the party to entertain the criminal intent; the incapacity which disqualifies for making a deed, for making a will, for making a bill of sale of personal property, is an incapacity which disqualifies a person to exercise a *disposing mind in respect to the particular thing*. The question is not one altogether of *brain-quantity*, or of *brain-quality*, in the abstract; but it is, whether the mind of the person could act and did act rationally regarding the particular matter. It is, in a case of marriage, whether the alleged insane person acted rationally regarding marriage, and the particular marriage; not, indeed, whether he acted wisely, but whether he acted from the impulse of a mind *sane*

[1] Ex parte Glen, 4 Des. 546, 549.

[2] In a late English case, Lord Penzance observed: "It was strenuously argued on the part of the respondent, that a marriage duly celebrated was not to be lightly annulled, and it was rather hinted than asserted that a less degree of sanity would be sufficient to make a marriage valid than would be required for the making of a will, and for some other purposes. But the court here has not, as in many testamentary cases, to deal with varieties or degrees in strength of mind, with the more or less failing condition of intellectual power in the prostration of illness, or the decay of faculties in extended age. The question here is one of health or disease of mind; and, if the proof shows that the mind was diseased, the court has no means of gauging the extent of the derangement consequent upon that disease, or affirming the limits within which the disease might operate to obscure or divert the mental power. . . . If any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, an act by which the parties bind their property and their persons for the rest of their lives." Hancock *v.* Peaty, Law Rep. I P. & M. 335, 340, 341.

as respects the thing done; though, as to this, a broad degree of general insanity would of itself, without special application to the particular thing, cover the particular ground. And there are some legal authorities which seem to give countenance to this view.[1]

§ 129. **Continued.** — But assuming the general proposition to have been well drawn from the decisions, that the mental unsoundness which disqualifies persons to enter into matrimony is the same which disqualifies them from making an ordinary contract, still this proposition furnishes us with only slight practical help in considering the varying circumstances of different cases. For plainly, when the question is, whether a party was capable of giving his consent to a particular thing, the nature of the thing must be taken into the account. Upon this principle, and this alone, is founded the doctrine,[2] that a difference exists between the insanity which disqualifies to make a contract, and the insanity which prevents the last will and testament from being valid. Therefore let us look a little further at the adjudications in respect of the particular insanity which makes a marriage void.

II. *Particular Applications of the General Doctrine.*

§ 130. **Commission of Lunacy — Lucid Interval — Insane Period — Insanity subsequent to Marriage.** — In England, by statute 15 Geo. 2, c. 30 (of a date, 1742, not sufficiently early to be received as common law in any of our States), if a commission of lunacy has been taken out against a party, and it remains unrevoked, his marriage, though celebrated during a lucid

[1] See True *v.* Ranney, 1 Fost. N. H. 52; Ward *v.* Dulaney, 23 Missis. 410, extracted from in note to § 127, ante; Harrod *v.* Harrod, 1 Kay & Johns. 4, 14; Doe *v.* Roe, 1 Edm. Sel. Cas. 344. In a Delaware case, Houston, J., observed: "It would be dangerous, perhaps, as well as difficult, to prescribe the precise degree of mental vigor, soundness, and capacity essential to the validity of such an engagement; which, after all, in many cases depends more on sentiments of mutual esteem, attachment, and affection, which the weakest may feel as well as the strongest intellects, than on the exercise of a clear, unclouded reason, or sound judgment, or intelligent discernment and discrimination, and in which it differs in a very important respect from all other civil contracts." p. 319. Elzey *v.* Elzey, 1 Houston, 308, 319. Perhaps the following cases, not matrimonial, may shed some light on the question: Aiman *v.* Stout, 6 Wright, Pa. 114; Hovey *v.* Hobson, 55 Maine, 256.

[2] Ante, § 126.

interval, is void.[1] But where there has been no commission of lunacy, the marriage of a lunatic, during a lucid interval, is good; and so it was in all circumstances in England before this statute,[2] and so, therefore, it is now by the common law of our States generally. On the other hand, the marriage of a person habitually sane, celebrated in a period of temporary insanity, is invalid.[3] The question in all cases is, whether the mind, at the time of the alleged consent, was capable of consenting. Therefore insanity, occurring subsequently to the nuptials, if the mind was sound at the time, does not affect their original validity, neither is it believed to be anywhere a cause of divorce.[4] But evidently if there are manifestations of mental disorder immediately following the ceremony, they may shed light on the condition of the mind at the time. And Dr. Ray considers, that there are cases of this kind of an extremely embarrassing nature.[5] It has been held, that the commission of suicide directly after the marriage is not sufficient evidence of insanity to render it void; and indeed the broad doctrine seems to have been maintained, that this is no evidence.[6]

§ 131. **Intoxication as a Species of Insanity.** — A learned

[1] Turner *v.* Meyers, 1 Hag. Con. 414, 4 Eng. Ec. 440, 442; Shelford Mar. & Div. 191, 197. See Cartwright *v.* Cartwright, 1 Phillim. 90, 1 Eng. Ec. 47; Wheeler *v.* Alderson, 3 Hag. Ec. 574, 599, 5 Eng. Ec. 211, 223; Borlase *v.* Borlase, 4 Notes Cas. 108; Grimani *v.* Draper, 12 Jur. 925.

[2] Shelford Mar. & Div. 197; Turner *v.* Meyers, 1 Hag. Con. 414, 4 Eng. Ec. 440, 442.

[3] Legeyt *v.* O'Brien, Milward, 325; Parker *v.* Parker, 2 Lee, 382, 6 Eng. Ec. 165.

[4] Parnell *v.* Parnell, 2 Hag. Con. 169; Page on Div. 185, note; Shelford Mar. & Div. 190. I find a Kentucky statute, enacted Dec. 20, 1865, which makes lunacy or unsound mind, of three years' standing, a cause of divorce, if it is the result of intemperance or of a hereditary taint of insanity, which was concealed at the time of the marriage. I am not aware that even this provision exists elsewhere. It proceeds, the reader perceives, on the idea of a fraud practised while the person was sane. I cannot but think that this statute treads very close to dangerous ground, if not upon it.

[5] Ray Med. Jurisp. Insan. 2d ed. § 201. See Wheeler *v.* Alderson, 3 Hag. Ec. 574, 5 Eng. Ec. 211.

[6] McAdam *v.* Walker, 1 Dow, 148, 180. And see Burrows *v.* Burrows, 1 Hag. Ec. 109, 3 Eng. Ec. 49; Chambers *v.* The Queen's Proctor, 2 Curt. Ec. 415, 7 Eng. Ec. 151; 1 Fras. Dom. Rel. 46. Probably the better rule is to receive the evidence of suicide when offered in connection with other testimony, but to reject it when standing alone. In a Tennessee case, Reese, J., observed: "A will prepared in view of suicide, and of course under the influence of the morbid and unhappy feelings leading to that catastrophe, must, where its validity is in question, be largely affected by that circumstance." Pettitt *v.* Pettitt, 4 Humph. 191, 193.

judge has observed, that a marriage will not be rendered void by being entered into while the party was intoxicated; though insanity from delirium tremens, produced by intoxication, will avoid it.[1] There is no question of the latter branch of this proposition;[2] and even as to the former the rule applicable to contracts generally, doubtless therefore to marriage, is, that mere intoxication, while the party retains his reason and knows what he is about, will not make the contract void.[3] It was, moreover, at one time, held, in respect to contracts generally, that intoxication unmingled with fraud was no excuse, and created no privilege in avoidance of them;[4] and the rule in equity seems still to be, that the court will not interfere to *assist* a party to a contract on the ground merely of intoxication, where no unfair advantage was taken.[5] But the settled doctrine of modern law is, that, since a person to make a valid agreement must have an agreeing mind,[6] a contract entered into by one so intoxicated as not to know what he is about is of no validity. The better opinion holds it unnecessary to charge the defendant with fraud, in order to produce this legal consequence;[7] though some of the cases go to the extent, that he must be connected with the intoxication,[8] or, at least, must have taken some unfair advantage of the other's situation.[9] In Indiana, Sullivan, J., observed: "Drunken-

[1] Clement *v.* Mattison, 3 Rich. 93.

[2] Legeyt *v.* O'Brien, Milward, 325. And see Menkins *v.* Lightner, 18 Ill. 282.

[3] Gore *v.* Gibson, 13 M. & W. 623.

[4] 2 Kent Com. 451, and the authorities there cited; Johnson *v.* Medlicott, 3 P. Wms. 130, note; Cooke *v.* Clayworth, 18 Ves. 12.

[5] 2 Kent Com. 452, 6th ed. note *b*. See, however, Clifton *v.* Davis, 1 Parsons, 31. And see Shaw *v.* Thackary, 23 Eng. L. & Eq. 18.

[6] Lord Ellenborough, in Pitt *v.* Smith, 3 Camp. 33; Gore *v.* Gibson, 13 M. & W. 623; Clifton *v.* Davis, 1 Parsons, 31. So on an indictment for an *attempt* to commit suicide, the court observed to the jury: "If the prisoner was so drunk as not to know what she was about, how can you find that she *intended* to destroy herself?" and she was accordingly acquitted. Reg. *v.* Moore, 16 Jur. 752; and see the observations on this case in 1 Am. Law Reg. 37. See also 1 Bishop Crim. Law, 5th ed. § 400–416.

[7] 2 Kent Com. 452; Chitty Cont. Perkins's ed. 140, note; Story Cont. § 27; Smith on Contracts, 233 and note; Barratt *v.* Buxton, 2 Aikens, 167; Fenton *v.* Holloway, 1 Stark. 126; Bennett *v.* The State, Mart. & Yerg. 133; Cornwell *v.* The State, Mart. & Yerg. 147; Cummings *v.* Henry, 10 Ind. 109.

[8] Woods *v.* Pindall, Wright, 507; Barney *v.* Dimmitt, Wright, 44. And see The State *v.* Turner, Wright, 20, 30; The State *v.* Thompson, Wright, 617, 622; 2 Greenl. Ev. § 374; Calloway *v.* Witherspoon, 5 Ire. Eq. 128.

[9] Hutchinson *v.* Tindall, 2 Green Ch. 357.

ness of itself merely, unless fraud be practised, will not avoid a contract; but, if the party be in such a state of intoxication that he is for the time deprived of reason, the contract is void."[1] The true distinction is, that, while in criminal jurisprudence a man is ordinarily to be held for his criminal act, committed in a fit of mere intoxication however oblivious, since his assent to the drinking to excess is a criminal assent,[2] — yet, in civil jurisprudence, the doctrine of contracts makes him bound only when his mind is capable of contracting, not permitting another person to gain an advantage from his mere intent to drink.

§ 132. **Continued.** — Applying the doctrine to marriage, this relation was in Scotland held not to have been entered into, and the form of marriage by mutual promise was pronounced void, where the woman was shown to have been in such a state of intoxication as to be incapable of giving a valid consent.[3] The incapacity flowing from drunkenness is not looked upon as permanent insanity, but is rather likened to intermittent, ceasing with the exciting cause.[4] At the same time, the cases cannot be numerous in which a marriage will in fact be celebrated while one of the parties is too drunk to understand what is going on, unless the other is practising some fraud in the matter. For no honest-minded person would be willing to go over the form of matrimony with another known to be beastly drunk, even though willing under other circumstances to marry a drunkard.

§ 133. **Deaf and Dumb — Blind.** — We hardly need say, that a person deaf and dumb may still be competent to contract matrimony. He may enter into it by signs.[5] The same principle applies to one deprived of sight.

§ 134. **Fraud Practised on Weak Intellect.** — The cases oftenest occurring are where partial insanity, or great weak-

[1] Jenners *v.* Howard, 6 Blackf. 240.

[2] 1 Bishop Crim. Law, 5th ed. § 397 et seq.

[3] Johnston *v.* Brown, 2 Scotch Sess. Cas. new ed. 437; s. c., where the facts are more fully reported, Ferg. Consist. Law, Rep. 229. This case appears to embrace also some of the elements of fraud.

[4] Wheeler *v.* Alderson, 3 Hag. Ec. 574, 5 Eng. Ec. 211; 1 Fras. Dom. Rel. 48; Shelford Mar. & Div. 199. See Elzey *v.* Elzey, 1 Houston, 308.

[5] Dickenson *v.* Blisset, 1 Dickens, 268; Elyot's Case, Cart. 53; Brower *v.* Fisher, 4 Johns. Ch. 441; Harrod *v.* Harrod, 1 Kay & Johns. 4; 1 Fras. Dom. Rel. 48.

ness of intellect, is circumvented by fraud. Of this nature was the Earl of Portsmouth's case: the Earl, being of weak mind, somewhat disordered, was led, by the artifice of his trustee and solicitor, whose influence over him was great, into a marriage with this person's own daughter; and the marriage was declared void.[1] And the case of Browning *v.* Reane is of the like nature; where a man of forty contrived to bring about, between himself and a woman of seventy, — a drunkard, with considerable property, which he meant to secure, — a marriage without a settlement, or the knowledge of her friends. It, also, was held to be void.[2]

§ 135. **Blending of Fraud and Insanity.** — Indeed, the two ingredients of fraud and insanity, thus blended together in matrimonial causes, often produce, by their united action, a nullity which neither of them could alone effect. We shall consider this topic further, when we come to treat of fraud.[3] At present it will be sufficient to add, that, in all cases of weakness of mind, where the act of the party is sought to be set aside on this ground of imbecility, the court inquires, among other things, whether the act was a proper one under the circumstances, and beneficial to the person whose mental weakness is in question. Plainly if found to have been such, the question of fraud is almost entirely excluded from the case, and that of mental imbecility is presented in a new aspect; for, as to the fraud, no injury was done, and therefore none was probably intended; and, as to the mental weakness, the particular act of the mind was not a weak one. Yet doubtless there might be a case of this general complexion, in which the marriage would still be adjudged void.[4]

[1] Portsmouth *v.* Portsmouth, 1 Hag. Ec. 355, 3 Eng. Ec. 154.

[2] Browning *v.* Reane, 2 Phillim. 69, 1 Eng. Ec. 190.

[3] Post, § 193 et seq.

[4] See, as rather illustrating than sustaining the doctrine of the text, Birdsong *v.* Birdsong, 2 Head, 289; Carr *v.* Holliday, 5 Ire. Eq. 167; Cartwright *v.* Cartwright, 1 Phillim. 90. In the case last cited, — a testamentary one, — in which the question was, whether the will of a person habitually insane was made in a lucid interval, Sir William Wynne observed: "Now I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? because, suppose you are able to show the party did that which appears to be a rational act, and

§ 135 *a*. **"Insanity," under a Statute.** — If a statute makes "insanity" a ground of nullity, but does not make fraud such, yet if a particular case is one of this double aspect in which fraud and mental weakness blend, the court may be embarrassed how to deal with it under the statute, though the course should be plain on the principles of the unwritten law. Thus, in Delaware there is the following provision: "The said court shall have such cognizance to decree marriages null and void which are prohibited by law for consanguinity, or affinity, or between a white person and a negro or mulatto, or where either of the parties had, at the time of the marriage, another husband or wife living; or where either of the parties was at that time insane." And the court came to the conclusion, that, under the statute, it had no jurisdiction to declare a marriage void for mental weakness not amounting to idiocy or lunacy, or for intoxication, or fraud practised on a weak mind.[1] This question, however, should be examined in connection with some doctrines to be stated in our second volume.[2]

III. *Confirmation by Cohabitation, and whether the Marriage is Void or Voidable.*

§ 136. **Void — Consequences.** — That the marriage of parties, one of whom was at the time of its celebration insane, is void, in distinction from voidable, we have already, in brief, considered.[3] The consequence of this doctrine is, that the defect may be relied upon, in avoidance of the marriage, not only in a suit between the parties, to set it aside, but in any cause, between the same parties or any other, wherein, either during the life of the married persons or afterward, the marriage is judicially called in question.[4] We have already seen,[5] that

it is his own entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further." p. 100.

[1] Elzey *v.* Elzey, 1 Houston, 308.

[2] Vol. II. § 291–293.

[3] Ante, § 93–95, 105, 125.

[4] Browning *v.* Reane, 2 Phillim. 269, 1 Eng. Ec. 190; Parker *v.* Parker, 2 Lee, 388, 6 Eng. Ec. 165; Ex parte Turing, 1 Ves. & B. 140, where a marriage within Stat. 12 Geo. 3, c. 11, was held to be void; Foster *v.* Means, 1 Speers Eq. 569; Johnson *v.* Kincade, 2 Ire. Eq. 470; Jenkins *v.* Jenkins, 2

[5] Ante, § 125.

there was once a time when marriages between insane persons were supposed to be valid. But since the darkness of this period passed away, down to a very recent date, there has not been any contrariety of opinion upon this question; nor, till recently, have there been promulgated any such doctrines as those mentioned in a preceding chapter,[1] indicating the necessity of a decree pronouncing the marriage null, in order for this consequence to follow. Yet, notwithstanding this doctrine, suits of nullity in these cases, directly between the parties, are always allowed; and, where a competent tribunal is called upon to pronounce the decree of nullity, and a case is made out, the tribunal, though even it be a court of equity, can exercise no discretion, but is compelled to proceed to the decree.[2] The marriage, indeed, is just as void in law without the decree as with it; while still prudential reasons, other than strictly legal, may strongly indicate the propriety of the party's carrying the matter for direct adjudication before the court.[3]

§ 137. **Contrary Views.** — Though the doctrines of the last section are both clear of themselves and founded on abundant authority, there are, as we have already seen,[4] both statutes and judicial decisions in which, in some of our States, they appear to be utterly ignored. Thus, not to speak of cases intimating that the invalidity of a marriage, where insanity is set up, can be relied upon only in a direct suit between the parties for its nullity, we have, of late, such legislation as was referred to in a previous chapter, wherein were quoted statutes in words ordaining this result.[5] Nor yet to speak of a recent Illinois case in which the court laid down the proposition, that, by the common law, the marriage of insane persons is good, and cannot be set aside even in a suit instituted for the express purpose,[6] we have a very late Georgia

Dana, 102; Middleborough *v.* Rochester, 12 Mass. 363; Wightman *v.* Wightman, 4 Johns. Ch. 343; Jaques *v.* The Public Administrator, 1 Bradf. 499; Rawdon *v.* Rawdon, 28 Ala. 565; Clement *v.* Mattison, 3 Rich. 93; Atkinson *v.* Medford, 46 Me. 510; Harrod *v.* Harrod, 1 Kay & Johns. 4; 1 Burge Col. & For. Laws, 138.

[1] Ante, § 94.

[2] Crump *v.* Morgan, 3 Ire. Eq. 91; Hancock *v.* Peaty, Law Rep. 1 P. & M. 335.

[3] Rawdon *v.* Rawdon, 28 Ala. 565; Wightman *v.* Wightman, 4 Johns. Ch. 343.

[4] Ante, § 90–95.

[5] Ante, § 91–95; Goshen *v.* Richmond, 4 Allen, 458.

[6] Hamaker *v.* Hamaker, 18 Ill. 137.

decision, in which, under the statutes, indeed, of Georgia, the majority of the court seem to have held the decree of nullity, on the ground of insanity, to annul the marriage only from the time it is rendered, making the marriage, therefore, originally good. Said Lumpkin, J., "Nowhere else is mental incapacity, except in Georgia, so far as I know, made a ground for *divorce*. Elsewhere proceedings are instituted in chancery, or some other court, to annul the pretended marriage. A sentence of *nullity* is rendered. Now, I maintain broadly, that in this State no decree can be rendered, separating man and wife, where there has been a marriage *de facto*, except under our divorce laws; that they have virtually repealed the whole body of the English ecclesiastical and common law upon this subject. Was any such proceeding ever known or heard of in Georgia, to obtain a sentence of *nullity?*"[1] Yet the court was certainly mistaken in its supposition, that nowhere except in Georgia is the suit to annul the marriage on the ground of insanity called a suit for *divorce;* the term "divorce" is, in Jacob's Law Dictionary, also in the reprint by Tomlins, defined to be "the separation of two, *de facto* married together, made by law." The definition is the same, substantially, in the Dictionary of Burn; and, though the expression "sentence of nullity" may be more appropriate, the term divorce has been always more or less used, both in England and in this country, to signify the sentence which pronounces the marriage void, both when it was in law void, and when it was in law voidable.

§ 137 *a*. **Continued.** — There is perhaps nothing more remarkable under this head than a Vermont case, decided as late as 1870, — by a court, it may be observed, from which excellent decisions on questions connected with marriage and divorce have sometimes proceeded. A lunatic, palpably and clearly such, and under guardianship as a lunatic, went through a form of marriage with a girl with whom he occasionally cohabited. He had no lucid interval, and there was no suspension of the guardianship. On his death it was held, that, no proceeding having been had to set aside this formal marriage, she was entitled to the legal rights of a widow.[2]

[1] Brown *v.* Westbrook, 27 Ga. 102, 106. [2] Wiser *v.* Lockwood, 42 Vt. 720.

This decision was, indeed, based upon the statutes of the State.[1] We have already seen something of this sort of enactment and its interpretation.[2] But the court also laid it down, that "this construction of the provisions of the statute is in harmony with the common law on the subject;"[3] not appearing to be aware that the books contain any doctrine contrary to this.

§ 138. **Desirableness of Direct Proceedings — Suspending Cause**

[1] Vt. Gen. Stats. c. 70, § 1–3, 5–8, as follows: —

"Section 1. All marriages which are prohibited by law or on account of consanguinity or affinity between the parties, or on account of either of them having a former wife or husband then living, shall, if solemnized within this State, be absolutely void without any decree of divorce or other legal process.

"Sect. 2. When a marriage is supposed to be void, or the validity thereof is doubted, for any of the causes mentioned in the preceding section of this chapter, either party may file a libel for annulling the same; the libel to be filed in the manner hereinafter prescribed; and, upon due proof of the nullity of the marriage, it shall be declared void by a sentence of divorce or nullity.

"Sect. 3. The supreme court may by a sentence of nullity declare void the marriage contract, for either of the following causes, existing at the time of marriage: —

"First. That the parties, or one of them, had not attained the age of legal consent.

"Second. That one of the parties was an idiot or lunatic.

"Third. That the consent of one of the parties was obtained by force or fraud.

"Fourth. That one of the parties was physically incapable of entering into the marriage state.

"Sect. 5. When a marriage is sought to be annulled on the ground of the idiocy of one of the parties, it may be declared void on the application of any relative of such idiot, interested to avoid the marriage, at any time during the lifetime of either of the parties.

"Sect. 6. When a marriage is sought to be annulled on the ground of the lunacy of one of the parties, it may be declared void at any time during the continuancy of that lunacy, or after the death of the lunatic in that state, during the lifetime of the other party to the marriage, on the application of any relative of the lunatic interested to avoid the marriage.

"Sect. 7. When the marriage of an idiot or lunatic is sought to be annulled during the lifetime of both the parties to the marriage, and no suit shall be prosecuted by any relative, a sentence of nullity may be pronounced on the application of any person admitted by the court to prosecute, as the next friend of such idiot or lunatic.

"Sect. 8. The marriage of a lunatic may also be declared void, upon the application of the lunatic, after the restoration of reason; but, in such case, no sentence of nullity shall be pronounced, if it shall appear that the parties freely cohabited as husband and wife, after the lunatic was restored to a sound mind."

[2] Ante, § 90–95.

[3] Referring to Bac. Abr. Idiots and Lunatics, D; Smart *v.* Taylor, 9 Mod. 98; Ex parte Turing, 1 Ves. & B. 140; Wightman *v.* Wightman, 4 Johns. Ch. 343; Co. Lit. 33 *a*. I cannot discover any thing here, except the "strange determination" spoken of by Blackstone (ante, § 125), to sustain the proposition to which these authorities were cited.

that they may be taken. — There is a North Carolina case which sheds over this subject a light really worthy of regard. Persons who alleged themselves to be husband and wife brought their bill in equity, for an account, against the guardian of the wife; and, among the pretences in the bill, they averred that the defendant guardian relied upon a fact of marriage had between the wife and another man, previously to the marriage solemnization between her and the plaintiff husband; which prior marriage, the bill averred, was void by reason of imbecility, &c., making the present marriage good. But the court declined to entertain, in this collateral way, the question of the invalidity of the former marriage; and so ordered the case to be "retained for further directions," that the plaintiff wife might meanwhile, if she saw fit, institute and carry on proceedings to have such former marriage declared void. Said Pearson, J.: "The plaintiff's counsel cited several authorities in support of the position, that, where nullity of marriage is incidentally put in issue, in any proceeding, before any tribunal, such tribunal has power to decide the question as necessarily involved in the exercise of its appropriate jurisdiction. Without entering upon this subject, it is sufficient to say, in the language of the court in Johnson *v.* Kincade,[1] 'It is convenient and fit in respect to the decent order of society, the condition of the parties, and succession of estates, that the validity of such a marriage should be directly the subject of judicial sentence.' And as the legislature has conferred *sole*, *original* jurisdiction, in *all applications for divorce*, upon the superior courts of law and courts of equity, and pointed out the mode of proceeding and the rules and regulations to be observed, and required that the material facts charged in the petition or libel shall be submitted *to a jury*, upon whose verdict, and *not otherwise*, the court shall decree and authorize a decree from the bonds of matrimony, or *that the marriage is null and void*, and after a sentence nullifying or dissolving the marriage, all and every the duties, &c., in virtue of such marriage shall cease and determine, with a proviso as to the legitimacy of the children, we do not feel at liberty to decide a question of such grave importance as a thing collateral or

[1] Johnson *v.* Kincade, 2 Ire. Eq. 470, 474. And see ante, § 136.

incidental to an ordinary bill for an account, where the trial will be made without the intervention of a jury, upon depositions which are usually taken in a defective and unsatisfactory manner."[1] Now, without entering upon any consideration of the peculiar jurisprudence of North Carolina, or of the effect of the statutes referred to by the judge, it seems to the writer of these volumes that, looking at the question as one of general jurisprudence alone, the course which the court gave to this case was, as a matter of practice, and viewed in reference to the particular facts alleged, eminently wise and just. And it would be an excellent rule, in whatever court adopted, to require that a party setting up any special matter, as insanity or the like, in avoidance of a fact of marriage under which cohabitation had taken place, should give timely notice of his purpose in this respect; and, if the case was one in which the party had it in his power, according to the laws prevailing, to institute a suit for nullity, then to require the investigation to be made by means of such a suit, or, in default of it, the withdrawal of the allegation. But this is not to hold the marriage voidable in distinction from void. It is not to make property change hands on the death of a person, whenever it should be thus ascertained that a formal marriage, without the matrimonial consent essential to superinduce the status, had taken place between such person and another; it is not to do injustice to the parties, but to establish justice as a uniform rule for them.

§ 139. *Affirming the Marriage by Subsequent Cohabitation:* — **Intimations against such Confirmation.** — From the proposition that the marriages of insane persons are utterly null and void, it may seem to result that the mutual recognition and cohabitation of the parties as husband and wife, after the return of reason, is insufficient to cure the original defect, especially in those localities where marriage is good only when solemnized according to a particular form. And in Crump *v.* Morgan, the Supreme Court of North Carolina appear, without absolutely deciding the point, to favor this view. They observe: "A writer upon the law of marriage," referring to Mr. Poynter, "lays it down that, when a marriage is void *ipso facto*, acquies-

[1] Williamson *v.* Williams, 3 Jones Eq. 446, 447, 448.

cence, long cohabitation, and issue, or the desire of the parties to adhere, cannot amend the original defect.[1] In a case of alleged insanity at the time of the marriage, subsequent acquiescence, during long and frequent periods of undoubtedly restored reason, would be cogent proof of competent understanding at the time of the marriage; but, assuming lunacy to have existed, the rule of the author quoted seems to be sustained by the consideration that marriage is a peculiar contract, to be celebrated with prescribed ceremonies, and, therefore, subsequent acts, not amounting in themselves to a marriage, will not make that good which was bad in the beginning."[2]

§ 140. **Such Confirmation Good.** — Yet probably this reasoning of the North Carolina court proceeds from an imperfect apprehension of the principle which properly governs questions of this nature. In localities where the law requires nothing more than consent to constitute a valid marriage, little doubt can exist, that, if the parties continue to cohabit after arriving at a lucid interval, this cohabitation will render their marriage good; and perhaps this is the state of the law in which the older authorities originated. For Shelford remarks, "there is authority for the proposition, that a marriage by a *non compos*, when of unsound mind, is rendered valid by consummation during a lucid interval."[3] But even where the local law requires the concurrence of two things; namely, first, a compliance with certain formalities; secondly, the consent of the parties; it does not appear that the formalities and the consent must concur in point of time. And we shall see in the proper place, that, in cases of fraud, duress, and the like, they need not; but, if there is a formal marriage to-day, to which, by reason of fraud, duress, or error there is no consent, yet, if the consent is given to-morrow, the marriage is good.[4] And the deed of an insane person has been termed voidable, not void;[5]

[1] Poynter Mar. & Div. 157.

[2] Crump *v.* Morgan, 3 Ire. Eq. 91. And see, as tending the same way, observations in Ward *v.* Dulaney, 23 Missis. 410, 432, 433.

[3] Shelford Mar. & Div. 197. Refers to Ashe's Case, Pr. Ch. 703; Freeman, C. C. 259.

[4] Post, § 215. The case of children marrying under the age of consent may seem also in point; but such marriages are held to be incomplete, not so much from a want of mental, as of physical, capacity. There no new solemnization is required.

[5] Allis *v.* Billings, 6 Met. 415.

though some old cases have a look the other way.[1] But the deed is not voidable in the sense of the ecclesiastical law of marriage; it simply requires no new sealing; it will bind the maker after he has, during a lucid interval, affirmed it, not before. For the same reason it would seem, that a lunatic, on regaining his reason, may affirm a marriage celebrated while he was insane, even though a statute had required a particular form of solemnization.[2] The purpose of the statute, being to secure notoriety for the marriage, and preserve the evidence of it, is thus fully accomplished, and the rights of the parties are at the same time protected.

§ 141. **Question further discussed.** — The cases to which we may presume Mr. Poynter alludes, in the place referred to by the North Carolina court, are of an entirely different nature from those now under consideration. They are cases in which, though the parties gave consent to the marriage, some defect of form entered into the original ceremony, when, of course, this defect could not be cured by any amount of consent given then or afterward. And perhaps, — a point not quite so plain, — if a man and woman should give consent to be to each other husband and wife, and should add to this consent a perfect compliance with all requisite forms, yet some impediment to the marriage should exist at the time, — such, for instance, as one of them having another matrimonial partner living, — this imperfect union could not be perfected, on the mere withdrawal of the impediment, by the bare repetition of the consent, without also a repetition of the forms. There are in the books cases which proceed on the supposition that marriage could not be constituted thus, yet probably the point is not directly adjudged.

§ 142. **Continued — The True Doctrine.** — And in a still later North Carolina case the learned judge observed: "It may well be, that a second marriage, while the first is still subsisting, is void and incapable of confirmation; because it is so utterly denounced by the law as to subject the party marrying a second time to capital punishment as a felon, but a mere want of age or understanding rests on a different footing

[1] Shelford on Lunatics, 255 et seq. 4 Johns. Ch. 343, 345. And see Durie v. Norris, 1 U. S. Mo. Law Mag. 49.

[2] See also Wightman v. Wightman,

entirely."[1] Also a late Tennessee case lays down the doctrine, that one who is married while a lunatic may, on being restored to reason, affirm the marriage, by acts recognizing its validity, without any new solemnization;[2] and there is really no room to doubt, that this is the true doctrine, applicable as well where particular forms are required, as where they are not.

CHAPTER IX.

WANT OF AGE.

§ 143. **General Doctrine — Marriage and Agreement to marry distinguished.** — The impediment of the want of age furnishes an illustration of the distinction, already mentioned, between an agreement of marriage, superinducing the status, and an agreement to marry.[3] An agreement to marry, entered into by an infant, being a person under the age of twenty-one years,[4] either with another infant, or with a person of full age, is, like any other executory contract, voidable by the infant, yet binding on the party who has reached his majority; consequently an infant can maintain an action for the breach of a promise to marry, against one who at the time of making it had arrived at the age of twenty-one years, while the latter can maintain no action against the infant.[5] But when the agreement to marry has been executed in a present marriage, its binding nature depends, not on the question of majority and minority in years, but upon the special question of capacity or incapacity to contract matrimony, considered as to physical capability, equally as to mental.

§ 144. **Physical Capability — Twelve and Fourteen Years of**

[1] Pearson, C. J. in Koonce *v.* Wallace, 7 Jones, 194, 198.

[2] Cole *v.* Cole, 5 Sneed, 57.

[3] Ante, § 3.

[4] Twenty-one is the age of majority at the common law, both in males and females; but there are several of our States in which the age is by statute reduced, as to females, to eighteen. See Kester *v.* Stark, 19 Ill. 328.

[5] Holt *v.* Ward, 2 Stra. 937; Hunt *v.* Peake, 5 Cow. 475; Willard *v.* Stone 7 Cow. 22; Cannon *v.* Alsbury, 1 A. K. Mar. 76; Pool *v.* Pratt, 1 D. Chip. 252; Warwick *v.* Cooper, 5 Sneed, 659; Hamilton *v.* Lomax, 26 Barb. 615.

Age. — We shall see, when we come to discuss the impediment of Impotence, that those persons of mature years who lack the capabilities on which the matrimonial connection depends, are, for this reason, disqualified to contract perfect marriage: so, according to the leading doctrine of this chapter, are boys and girls whose physical natures are not sufficiently mature. The general proposition is, that infants can marry;[1] but persons, whether older or younger than twenty-one, who have no physical capacity, either because they want the maturity which age alone brings, or because of some incurable defect in the organism, cannot contract a marriage completely valid; while, on the other hand, they can find no refuge from the consequences of a bad bargain in the general law of minority. The case has been likened to the executory agreement of an infant to purchase necessaries, on the one hand; and the executed agreement, on the other hand; the former does not bind him; but, when executed by the delivery and acceptance of the necessaries, the latter then binds him.[2] We shall see,[3] that the existence of a physical defect in persons of mature years is a fact to be proved in each particular instance; but the age of puberty for matrimonial purposes is, at the common law, fixed at fourteen in males and twelve in females.[4] This age is termed the age of consent, and Littleton calls it also "the age of *discretion*";[5] while Ayliffe, in a more exalted strain, praises the infantile capacity of fourteen and twelve thus: "This is the age of persons, which the law has deemed capable of advice and understanding, which ought to be principally regarded in the business of matrimony, because so many inconveniences may flow from an indiscreet marriage!"[6]

[1] Gavin *v.* Burton, 8 Ind. 69.

[2] Pool *v.* Pratt, 1 D. Chip. 252.

[3] Post, § 321 et seq.

[4] Pool *v.* Pratt, supra; 1 Bright Hus. & Wife, 4; Arnold *v.* Earle, 2 Lee, 529, 6 Eng. Ec. 230; The Governor *v.* Rector, 10 Humph. 57; Parton *v.* Hervey, 1 Gray, 119; Rex *v.* Gordon, Russ. & Ry. 48.

[5] Co. Lit. 79 *a*, and Mr. Hargrave's note, No. 43.

[6] Ayl. Parer. 361. Swinburne says; "The reason is, that because at these years the man and the woman are not only presumed to be of discretion and able to discern betwixt good and evil, and what is for their profit and disprofit; but also to have natural and corporal ability to perform the duty of marriage, and in that respect are termed *puberes*, as it were plants, now sending forth buds and flowers, apparent testimonies of inward sap, and immediate messengers of approaching fruit." Swinb. Spous. 2d ed. 47.

§ 145. **Twelve and Fourteen, continued — Statutes extending the Age — How construed.** — The common-law rule of fourteen in males and twelve in females, as the age of consent, was derived from the civil law, also substantially from the canon.[1] The Scotch law has the same rule. It originated in the warm climate of Italy, and it has been thought not entirely suited to more northern latitudes.[2] In some of the United States, it has been altered by statute, and the age of consent fixed at later periods of life. When a statute provided, "that male persons of the age of eighteen years, and female persons of the age of fourteen years, ... may be joined in marriage," this was held, in Iowa, not to alter the common law; but infants below those ages, and within the common-law ages of consent, might still marry.[3] This is pretty plainly the true construction, since the statute contains no negative words,[4] though the contrary construction was rather assumed than decided in an Ohio case.[5] More recently in North Carolina, a construction founded on a like reason with the Iowa one was adopted. The statute providing, that "females under the age of fourteen and males under the age of sixteen years, shall be incapable of contracting marriage;" and parties having married under those ages, yet continued to cohabit until they had passed those ages; the court held the marriage to be good, as at the common law. Said Pearson, C. J.: "In the opinion of this court, the only effect of the statute was to make sixteen instead of fourteen years in respect to males, and fourteen instead of twelve years in respect to females, the ages at which the parties respectively were capable of making a perfect marriage, leaving the rule of the common law unaltered in all other respects."[6] In various other States, the common-law rule of fourteen and twelve still prevails.[7]

§ 146. **Proof of Actual Puberty.** — The canon law seems not to regard the ages of fourteen and twelve as conclusive, but to

[1] 1 Bl. Com. 436.

[2] 1 Fras. Dom. Rel. 42; Ferg. Consist. Law, 136, and App. 54; Rogers Ec. Law, 2d ed. 632, note.

[3] Goodwin *v.* Thompson, 2 Greene, Iowa, 329. See also Parton *v.* Hervey, 1 Gray, 119; Bennett *v.* Smith, 21 Barb. 439; Fitzpatrick *v.* Fitzpatrick, 6 Nev. 63; People *v.* Slack, 15 Mich. 193.

[4] Post, § 283.

[5] Shafher *v.* The State, 20 Ohio, 1.

[6] Koonce *v.* Wallace, 7 Jones, N. C. 194, 196. And see Williamson *v.* Williams, 3 Jones Eq. 446.

[7] Warwick *v.* Cooper, 5 Sneed, 659.

admit of the capacity or puberty of the party being proved by actual inspection.[1] In a Scotch case it was attempted, on the strength of considerable Scotch as well as canon-law authority, to establish the same rule; but the court refused, chiefly because of the inexpediency of permitting the indecent examinations necessary in its application.[2] The common law also seems not to have yielded to the inquisitive disposition of the canon law, but to have always contented itself with the simple inquiry into the age of the parties.[3]

§ 147. **Age of Seven — Below — Above — (Under Michigan Statute, in the Note).** — There is moreover another period to be considered; that of seven years, alike in male and female. If either party to a marriage is below seven, it is a mere nullity.[4] If both parties have arrived at seven, and either one of them is below his or her age of consent, or, if both are,[5] they may still contract an inchoate or imperfect marriage. This marriage they cannot avoid or annul, until the party discarding it has reached the age of consent for such party, whether it be twelve or fourteen;[6] and perhaps not, until the other has also arrived at his or her age of consent.[7]

§ 148. **At what Age dissent — How — Common Law of our States.** — Judge Reeve observes: "In Rolle's Abr. 341, there is

[1] Ayl. Parer. 247; 1 Fras. Dom. Rel. 43; 1 Bl. Com. 436; Bowyer Com. 45.

[2] Johnston *v.* Ferrier, cited 1 Fras. Dom. Rel. 43.

[3] 1 Bl. Com. 436; Macpherson on Infants, 168. See 1 Bishop Crim. Law, 5th ed. § 373.

[4] 2 Burn Ec. Law, 434; 1 Bl. Com. 436, note 11, by Chitty, &c.; Swinb. Spousals, 20, 23.

[5] Ante, § 143.

[6] Co. Lit. 79.

[7] Swinb. Spousals, 34. In Michigan, there is the following statute: "In case of a marriage solemnized when either of the parties was under the age of legal consent, if they shall separate during such nonage, and not cohabit together afterwards, . . . the marriage shall be deemed void without any decree of divorce or other legal process." And this is deemed to be an original provision, not necessarily to be interpreted by the common law. The majority of the court held, that, where a man marries a girl below the age of consent, fixed, by another statute, at sixteen, the marriage is not void unless they separate by mutual consent before she reaches that age, or unless she refuses to continue the cohabitation after reaching that age. Campbell, J., dissented so far as to hold that, if they separated before the age of consent, the consent to the separation need not be mutual. "We are all agreed," said Cooley, J., "that, if the separation takes place with consent of the party under age, and cohabitation is not resumed after such party attains the age of consent, the marriage is thereby rendered null; while we are not agreed that the party who is of competent age can by his own act annul it." People *v.* Slack, 15 Mich. 193, 199.

a case where a wife, being only eleven years of age, did then disagree to the marriage; and the husband, being then of the age of consent, married another woman, and by her had a child. Such child was adjudged to be a bastard, because the former marriage continued valid; for the first wife, when she dissented to the marriage, had not arrived at the age when she could dissent. A marriage of such tender age has not been heard of in Connecticut, I believe; and I cannot suppose that such marriage would be considered valid."[1] But it is believed, that, notwithstanding this intimation, the common law of our States generally is, upon this subject, the same as upon most others, precisely what it is, or rather was, at the time of the settlement of this country, in England. In New York, a man having entered into a marriage with an infant under twelve years of age, who immediately declared her ignorance of the nature and consequences of the ceremony, and her dissent from the connection, — the Court of Chancery, on a bill filed by her next friend, ordered her to be placed under the protection of the court, as a ward, and prohibited the man from all intercourse or correspondence with her, under pain of incurring a contempt.[2] Whether this proceeding be warranted by the English practice or not, it can hardly be deemed an abnegation of the common-law doctrine; it is rather a method adopted to give it a more equitable effect, since it does not deny the right of the girl to affirm the marriage on reaching her age of consent.

§ 149. **Dissent, continued — Both bound or Neither.** — Though one of the parties has passed the age of consent, if the other has not, either may avoid the marriage when the latter has arrived at such age; as, if a boy of fourteen marry a girl of ten, he, at her age of twelve, as well as she, may disaffirm the marriage. This, it is seen, is a different rule from what governs in the ordinary contracts of minors. The reason given for the difference is, that, in matrimony, either both parties must be bound, or an equal election of disagreement must be open to both.[3] And such, we may observe, is the general doc-

[1] Reeve Dom. Rel. 237.

[2] Aymar *v.* Roff, 3 Johns. Ch. 49. In Ohio, a doctrine differing somewhat from that stated in our text has been held, though without much discussion. Shafher *v.* The State, 20 Ohio, 1.

[3] Co. Lit. 79, and Mr. Hargrave's note, No. 45; 1 Bl. Com. 436; 1 East,

trine in marriage; for, if a person disqualified to contract matrimony marries another ignorant of the impediment, neither of the parties is, as a general rule, bound, but either may take advantage of the defect. Still, as one exception to this rule, — and there are doubtless others, — it has probably never been held, that a man can maintain a suit to have his marriage declared void solely on the ground of his own fraud; though his own fraud would not prevent his maintaining the suit, if other elements of nullity controlled the case.[1]

§ 150. **How the Dissent expressed — And when.** — The disaffirmance by the persons, married under the age of consent, may be either with[2] or without[3] a judicial sentence: yet, when it is by judicial sentence, the question seems somewhat obscure, whether the court may proceed, or not, before the parties have reached the respective ages of fourteen and twelve.[4] But, in reason, when the parties are under those ages, they should be excluded from maintaining the suit; because they can no more consent to it than consent to the disaffirmance of the marriage without suit; whatever others, having the right to control their marriages, might do.[5] When both have attained the age of consent, if they then affirm the marriage, it is ever afterward binding, and no new ceremony is required.[6] A very obvious mode of affirming is by continuing to cohabit,[7] or by sexual intercourse; and the same

P. C. 468; Godol. Ab. 507; Gibs. Cod. 423. The canons of Richard, who succeeded Thomas Becket in the see of Canterbury (A. D. 1175, 18th canon), enjoin, in conformity with the decrees of Pope Nicholas, that "*marriage is null without the consent of both parties.* They who marry boys and girls do nothing, unless they consent after they come to years of discretion. Therefore we forbid the conjunction of those who have not both attained the legal and canonical age, unless there be urgent necessity for the good of peace." *Vide* the same injunction repeated in the Constitutions of Edmund, Archbishop of Canterbury, 1236. Johnson's Canons, vol. 2; Rogers Ec. Law, 2d ed. 632. See 2 Burn Ec. Law, 434; post, § 151.

[1] Post, § 300; Miles *v.* Chilton, 1 Robertson, 684.

[2] Gibs. Cod. 446; 2 Burn Ec. Law, 500; Sir George Hay, in Harford *v.* Morris, 2 Hag. Con. 423, 4 Eng. Ec. 575, 577.

[3] Co. Lit. 79 *b*; Burn, supra, p. 435; 1 Bl. Com. 436.

[4] Compare Co. Lit. 79 with Gibs. Cod. 446, followed by Burn, as above cited, Aymar *v.* Roff, 3 Johns. Ch. 49; ante, § 149.

[5] But see on this subject Aymar *v.* Roff, 3 Johns. Ch. 49; ante, § 148.

[6] Co. Lit. 79; 1 Bl. Com. ut supra; Koonce *v.* Wallace, 7 Jones, N. C. 194; ante, § 145.

[7] 2 Dane Ab. 301; Coleman's Case, 6 N. Y. City Hall Recorder, 3.

has been said to follow from "endeavors only,"[1] and from kissing, embracing, sending gifts, and so on. In this, it is seen, a different rule, resting on a different reason, prevails, from what governs in the transformation of espousals *per verba de futuro* into matrimony, where no familiarities, short of the carnal act, will suffice.[2] It has been said also, that, when the parties continue to cohabit as husband and wife after they pass the age of consent, this amounts to an affirmance of the marriage, even though, by parol or in writing, they disagree, unless the disagreement is made before the ordinary;[3] which expression, translated into American law-English, probably means, unless the disagreement is affirmed by the judgment of a judicial tribunal, or is otherwise made matter of judicial record.

§ 151. **Dower — Nine Years of Age — Seven — Four.** — The husband dying admits the wife to her dower, if, at the time of his death, she has attained the age of *nine* years;[4] "of what age soever," adds Lord Coke, "her husband be, although he be but four years old."[5] But the latter clause of this proposition, quoted from Coke, appears inconsistent with the doctrine before stated,[6] on the authority of Burn and others, that the marriage is absolutely void unless *both* parties are at least seven years old; for surely dower cannot rest on a completely void marriage. Looking at this question in the light of principle, if we assume the correctness of the doctrine which denies all capacity for marriage to boys and girls below seven, the result must follow, that, while one of the parties is under seven, the marriage is totally null, whatever be the age of the other. Because, as we have seen,[7] in the executed contract of marriage, either both must be bound or neither; for, if the boy be not a husband, the girl, lacking a husband, cannot be a wife; and, if the marriage is null as to the child four years old, it must be so as to the more mature party of nine years. Yet when the husband has attained the age of seven, nine is in law a woman's age "to deserve dower."[8] If she is

[1] Ayl. Parer. 250.
[2] Swinb. Spousals, 27, 28, 40, 228.
[3] Com. Dig. Baron & Feme, B. 5; Hubback on Succession, 272.
[4] Co. Lit. 78 *b*; Swinb. Spousals, 28.
[5] Co. Lit. 33 *a*.
[6] Ante, § 147.
[7] Ante, § 149.
[8] Co. Lit. 78 *b*.

married at seven, and the husband, having land, aliens it; and, after the alienation, she attains the age of nine years, and then the husband dies; she is dowable of this land; for, though at the time of the marriage she was not dowable absolutely, yet she was conditionally, that is, dowable if she should reach the age of nine before the death of her husband.[1]

§ 152. **Whether the Children legitimate.** — The legitimacy of the children of these inchoate marriages depends, perhaps, on another principle. Though a child is born in wedlock, he is illegitimate when the husband can be shown not to be the father;[2] "as, if the husband be but eight years old, or under the age of procreation."[3] And probably, whenever the husband is under fourteen, he is to be presumed, *primâ facie* at least, or even conclusively, incapable of becoming a parent.[4]

§ 153. **Void or Voidable — Inchoate.** — This impediment of want of age is usually treated of as rendering the marriage void, in distinction from voidable.[5] We have seen that it is truly void when either of the parties is below seven years.[6] But when both are above seven, it is in fact voidable only;[7] and it appears not to differ materially from the marriages known in the ecclesiastical law as voidable, on account of canonical impediments; except that the latter can only be avoided by judicial sentence, while the former may, by the parties themselves, without sentence. And Ayliffe says, that a marriage while the parties are under the age of fourteen in the man, and twelve in the woman, is "not void, but only voidable;"[8] and so, it would seem, this marriage should properly be described; though no objection lies to the language of Lord Coke, who calls it an "inchoate and imperfect marriage."[9]

[1] Co. Lit. 33 *a.*; post, 546–548.

[2] Lomax *v.* Holmden, 2 Stra. 940; Foxcroft's Case, 1 Rol. Ab. 359; St. George *v.* St. Margaret, 1 Salk. 123; Platt *v.* Powles, 2 M. & S. 65, 68; Rex *v.* Luffe, 8 East, 193, 200.

[3] Co. Lit. 244 *a.*

[4] 1 Woodd. Lect. 234, and note.

[5] Elliott *v.* Gurr, 2 Phillim. 16, 1 Eng. Ec. 166, 168; ante, § 105, 114.

[6] Ante, § 147.

[7] Contra, Shafher *v.* The State, 20 Ohio, 1.

[8] Ayl. Parer. 361.

[9] Co. Lit. 33 *a;* Warwick *v.* Cooper, 5 Sneed, 659.

CHAPTER X.

THE IMPEDIMENT OF SLAVERY AND THE EFFECT OF EMANCIPATION.

§ 153 *a*. **General View — Scope of the Discussion.** — Though slavery has come to an end in this country, yet there are living multitudes of persons who were married as slaves, and who have continued to cohabit as husband and wife since emancipation. It becomes, therefore, even more important than it was before emancipation to know what was the law of slave marriages, and especially to ascertain what is the effect of the emancipation of the parties, and of their subsequent cohabitation, as to the matrimonial status. The author will, therefore, continue in this edition the substantial parts of the chapter written on the impediment of slavery while the institution existed in a part of our States, enlarged by such matter as has arisen out of the new condition of things.

§ 154. **What the Law of Slavery with us.** — The law of slavery, in our slave States, was not the law of English serfdom, as it used to exist in the mother country; but it was a law of our own, not derived from the English common law, yet taking its form and dimensions more from the Roman law of slavery than from any other previously known system.[1] Yet, while the law of slavery was substantially the same in all the slave States, there were some differences, and especially was the institution milder in the more northern than in the more southern of these States. According to the law, however, of all the States in which slavery existed, the slave was deemed to sustain the twofold character of a person and property.[2]

§ 155. **Slave Marriages in New York — Massachusetts — Children — (Connecticut, in the Note).** — There was, during the

[1] Pirate *v.* Dalby, 1 Dall. 167, 169; Neal *v.* Farmer, 9 Ga. 555; Bynum *v.* Bostick, 4 Des. 266, 267; Tims *v.* Potter, Martin. N. C. 22, 24; Mahoney *v.* Ashton, 4 Har. & McH. 295, 303; Jackson *v.* Bulloch, 12 Conn. 38; Charlotte *v.* Chouteau, 21 Misso. 590; 1 Bishop Crim. Law, 2d ed. § 732.

[2] 1 Bishop Crim. Law, 2d ed. § 729, 730; 4th ed. § 779, 780.

existence of slavery in New York, a statute providing that all marriages where one or both of the parties are slaves, are equally valid as though the parties were free, and their issue is declared to be legitimate. Under this statute it was held, that when a slave man and a free woman intermarried, the children born of the marriage were to be deemed the free and legitimate children of the woman.[1] Likewise in Massachusetts, where, as Mr. Gray observes, "previously to the adoption of the State Constitution in 1780, negro slavery existed to some extent, and negroes held as slaves might be sold, but all children of slaves were by law free,"[2] there was a statute providing, that "no master shall unreasonably deny marriage to his negro with one of the same nation; any law, usage, or custom to the contrary notwithstanding."[3] And either in consequence of this provision, or of judicial adjudication upon the question as one of common law, slave marriages were deemed to be valid, and the rights of divorce were extended to slaves, the same as to freemen. Thus, as Mr. Gray also observes, "in 1745, a negro slave obtained from the governor and council" — the tribunal which then had the jurisdiction over divorces — "a divorce for his wife's adultery with a white man."[4] But these decisions in Massachusetts and New York, resting as they do on special statutes, and pronounced in States where slavery was never precisely what it was in our more southern States, shed no light upon the question of the marital capacity, if the expression be allowable, of slaves in the latter States.

§ 156. **In other Slave States — Slave Marriages Illegal.** — Therefore, in those States in which general emancipation has recently taken place, no doctrine of the sort just stated has prevailed, as matter either of common or of statutory law. On the other hand, it was the established law, that the marriages of slaves were to be deemed null and void.[5] The reason of this doc-

[1] Marbletown *v.* Kingston, 20 Johns. 1.

[2] Note to Oliver *v.* Sale, Quincy, 29.

[3] Prov. Stat. of Oct. 1705, c. 19, § 2. Ancient Charters, 748.

[4] Note to Oliver *v.* Sale, supra. Reeve, speaking of the law of Connecticut when slavery prevailed there, observes: "If a slave married a free woman, with the consent of his master, he was emancipated; for his master had suffered him to contract a relation inconsistent with a state of slavery. The right and duties of a husband are incompatible with a state of slavery." Reeve Dom. Rel. 341.

[5] Smith *v.* The State, 9 Ala. 990; Howard *v.* Howard, 6 Jones, N. C. 235;

trine seems to have been twofold; first, there was in the slave, as he was known to the law, no such freedom of will as is required to pass the matrimonial consent; secondly, the duties of husband or wife are incompatible with the duties which the slave owed to the master. There was indeed another reason; namely, that, since the master owned the slave as property, all the acquisitions of the slave accrued to the master as the master's acquisitions. But this other reason is not good; because it was never known that a slave's wife was made by law to accrue to the master as the master's acquisition; in other words, as the master's wife; or the slave-woman's husband, to accrue to the mistress, as her husband.

§ 157. **Slave Marriages Illegal, continued.** — The two propositions upon which the legal incapacity of slaves to enter into matrimony rested, have been stated by learned judges as follows: "Marriage is based upon contract; consequently the relation of 'man and wife' cannot exist among slaves. It is excluded both on account of their incapacity to contract, and of the paramount right of ownership in them as property."[1] Said another learned judge: "Persons in that condition [slavery] are incapable of contracting marriage; because that relation brings with it certain duties and rights, with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract are necessarily incompatible with the nature of slavery, as the one cannot be discharged, nor the other be recognized, without doing violence to the rights of the owner. In other words, the subjects of the contracts must cease to be slaves, before the incidents inseparable to the relation of marriage, in its proper sense, can attach."[2]

§ 158. **Continued.** — Let us, therefore, consider these two reasons, in order, not to bring into question the doctrine itself, for plainly this was well settled, but to ascertain what is the status, as to matrimony, of the slaves upon their becoming

Malinda *v.* Gardner, 24 Ala. 719; The State *v.* Samuel, 2 Dev. & Bat. 177; Commonwealth *v.* Clements, 6 Binn. 206, 211; Timmins *v.* Lacy, 30 Texas, 115; Johnson *v.* Johnson, 45 Misso. 595; The State *v.* Taylor, Phillips, 508; Estill *v.* Rogers, 1 Bush, 62.

[1] Pearson, C. J., in Howard *v.* Howard, 6 Jones, N. C. 235, 236

[2] Goldthwaite, J., in Malinda *v.* Gardner, 24 Ala. 719, 727.

free. The first reason was, that the slave had no power of consent or contract. We might well doubt the doctrine itself, if this was the only reason upon which it rested. The law of the slave States held the slaves to be capable of the utmost freedom of will, when the question related to their capacity for crime; neither the general constraint of slavery, nor even the direct command of the master, having ever been received, when the slave was indicted for a crime, as an excuse freeing him from legal responsibility for the act.[1] And it would be strange that, against the master's consent, the slave should be capable of binding him to the consequences flowing from the slave's crime, such as the loss of the slave's services, or of the slave himself, by reason of his being imprisoned or put to death for the crime; and binding himself, whether the master consented or not, to the loss of his own liberty of personal locomotion, or his own life; yet, on the other hand, should be incapable, even with the master's permission, of exercising the freedom of will which forms the basis of the consent to matrimony. But the second proposition, namely, that the duties of husband or wife are incompatible with the duties of a slave, is evidently sound in law,[2] and upon this it is that the doctrine which denies to slaves the power of matrimony principally rests.

§ 159. **Emancipation.** — When, however, the slave man and the slave woman are both emancipated, they are no longer destitute of the legal capacity to perform those duties, toward each other, which the marriage vow enjoins. And in a Louisiana case it was held, during slavery, that, upon emancipation, the marriage, which was before invalid, became good. Said the judge: "The only question in this case, submitted to the court, is, whether the marriage of slaves produces any of the civil effects resulting from such a contract, after manumission. It is clear, that slaves have no legal capacity to assent to any contract. With the consent of their masters they may marry, and their moral power to agree to such a contract or connection as that of marriage cannot be doubted; but, whilst in a state of slavery, it cannot produce any civil effect, because

[1] 1 Bishop Crim. Law, 2d ed. § 736; 4th ed. § 786.

[2] And see ante, § 155, note.

slaves are deprived of all civil rights. Emancipation gives to the slave his civil rights; and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produces all effects which result from such contract among free persons."[1] Whether, in the facts of this case, there had been cohabitation subsequent to emancipation, the report does not disclose.

§ 160. **Continued.** — In a North Carolina case, this Louisiana decision was denied to be good law, and the opposite doctrine was maintained. Said Pearson, C. J.: "Our attention was called to Girod *v.* Lewis, 1 Cond. La. 505 [being the same case which is cited in the last section], where it is held that 'a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produces all the effects which result from such contracts among free persons.' No authority is cited, and no reason is given for the decision, except the suggestion, that the marriage, being dormant during the slavery, is endowed with full energy from the moment of freedom. We are forced to the conclusion, that the idea of civil rights being merely *dormant* during slavery is rather a fanciful conceit (we say it with respect), than the ground of a sound judgment. It may be, that, in Louisiana, the marriage relation is greatly affected by the influence of religion, and the mystery of its supposed dormant rights is attributable to its divine origin. If so, the case has no application; for, in our courts, marriage is treated as a mere civil institution."[2]

§ 161. **Continued.** — The case in which these observations by the learned North Carolina judge occur, is the following: A male and female slave intermarried, with the consent of the owners, in the form usual among slaves; afterward the male slave was emancipated, and purchased his wife; they then had born to them one child; he next emancipated the female slave, and, the two still living as husband and wife, but without any further ceremony passing between them, they had several other children. It was held, that neither the first nor the others of

[1] Girod *v.* Lewis, 6 Mart. La. 559, opinion by Matthews, J.

[2] Howard *v.* Howard, 6 Jones, N. C. 235.

these children were legitimate, so as to take as tenants in common with legitimate children of the father by a second marriage, celebrated after the death of the supposed first wife. Said the judge: "The emancipation of the father could not draw after it the prior relation [that is, make the parties legally husband and wife], because the mother was not then free, and, in fact, afterwards became his slave. So the relation was not connected with the status of the parties in a way to follow as an incident. Suppose, after being free, the father had married another woman, could he have been convicted of bigamy, on the ground that a woman who was his slave was his wife? Or after both were freed, would the penalty of the law have attached, if either had married a third person, living the other? [It would plainly have attached, if the marriage, which during slavery was invalid, became valid upon emancipation.] Certainly not; because the averment of a prior lawful marriage could not be supported [whether this averment could be supported or not, would depend upon whether or not the marriage, which, during slavery, could not be valid because the parties were not in a legal situation to discharge the duties of husband and wife to one another, became valid upon the disability being removed by emancipation]; and yet, if the marriage followed the emancipation as an incident, it would present an instance of a marriage relation which either is at liberty to dissolve at pleasure."[1]

§ 162. **Continued.** — In the facts of this North Carolina case, there is involved the particular matter upon which the writer of these volumes deems that the decision, in all such cases, ought, in principle, to turn. If, after the emancipation, the parties live together as husband and wife; and if, before emancipation, they were married in the form which either usage or law had established for the marriage of slaves; this subsequent, mutual acknowledgment of each other as husband and wife should be held to complete the act of matrimony, so as to make them lawfully and fully married from the time at which this subsequent living together commenced. In those localities in which mutual consent of parties to be husband and wife constitutes of itself, without any superadded forms, perfect matri-

[1] Howard *v.* Howard, 6 Jones, N. C. 235.

mony, the facts thus indicated would seem to be sufficient without any aid from what took place between them during slavery. And in those localities where a superadded ceremony is necessary, there seems to be no reason why the ceremony which took place during slavery — suppose it was not, or suppose it was, the same ceremony which the law made necessary to constitute marriage between whites, still it was the ceremony which the law of usage had established for the blacks — should not be deemed to combine with the consent which passed between the parties after emancipation, so as to make the nuptials complete. We have seen,[1] that such is the law of marriages celebrated during a temporary insanity of the parties, and celebrated where the parties were too young to pass the consent which constitutes complete matrimony; and in future pages we shall see, that the same rule applies to cases of fraud, of impotence, and perhaps of some other impediments. Probably, where a man who has a wife living marries another, but the lawful wife afterward dies, this rule does not apply, so as to connect the invalid ceremony with the consent which the subsequent cohabitation, under the marriage originally void, implies. But assuming, at least for the argument, that the rule does not apply to such a case, we shall readily see that the case differs widely from the marriage of slaves. The man, in marrying a second time while a former marriage stood in full force, committed a high offence against the law of morality, and a felony against the law which is written in the statutes of the State. But the slave did a moral act which, though not valid in law, was no violation of legal duty. "We admit," said a learned Alabama judge, "the moral obligation which natural law imposes in the relation of husband and wife among slaves;" yet he added, "all its legal consequences must flow from the municipal law. This does not recognize, for any purpose whatever, the marriages of slaves."[2] The distinction thus drawn in this section, between giving a subsequent validity to an invalid act, resting upon the question whether the act was a

[1] Ante, § 139–142, 149, 150, 153.

[2] Smith *v.* The State, 9 Ala. 990, 996. Consequently it was held, that slaves cohabiting as husband and wife might be witnesses for and against each other. S. P. The State *v.* Samuel, 2 Dev. & Bat. 177.

moral and lawful one, or was immoral and unlawful, runs through the entire field of our law.[1]

§ 163. **Continued.** — But where there is no confirmation of the marriage after emancipation, either by cohabitation or otherwise (and it would be reasonable to require the confirmation to be by cohabitation), it would come within the reason of the law, as it will be seen to run through all these chapters, to hold the parties free from matrimonial bands. Moreover, according to usage in all places where slavery existed in our country, the marriages between slaves were dissolvable without judicial sentence, whenever the parties were permanently separated. Even South Carolina, the State which prided herself, as we have seen,[2] upon never suffering divorces to pass between white people, did not fail to appreciate the thrift which would follow from allowing practical divorces among those blacks who were separated too far to render convenient the begetting of slave children. Now, if the law takes any cognizance of these slave marriages, it must take equal cognizance of these slave divorces. And who knows that a divorce has not taken place, when the parties, after becoming free, nevermore recognize each other as husband and wife?

§ 163 *a*. **Continued. — Late Views.** — Thus, in substance, the discussion stood in the fourth edition of this work, published during slavery. Since the general emancipation of the slaves in all the slaveholding States took place, this question has been several times agitated before the courts; and, in all or nearly all the cases, the foregoing views of the author have been adopted. In many or most of those States also, statutes have been passed aiding this result. There are some Kentucky cases from which it would seem, that the courts of this State — in which, it may be observed, a formal ceremony is required by the general statutes to make any marriage good — do not deem the former marriages of slaves capable of being confirmed, except by compliance with the act of the legislature relating to them, or by a new marriage under the general law. And when such a marriage is so confirmed, it takes effect for general purposes only from the time when the confirming act is

[1] And see ante, § 139–142.

[2] Ante, § 38, 42, 43.

performed.[1] But if this should be found to be an exception to the adoption of the foregoing views, it is the only one of which the author is aware. Thus it has been adjudged in Tennessee, that, if slave parties who before emancipation were in form married continue after emancipation to cohabit as husband and wife, this is a ratification of their invalid marriage; then, if the man marries another wife, he commits the crime of polygamy.[2] And in various other States, the same doctrine as to the confirmation of the slave marriage by subsequent cohabitation has been laid down by the courts.[3] Thus, it is not fornication for the parties to continue their cohabitation, without further marriage formalities, after they are emancipated.[4] Again, where a slave had two wives, and after his emancipation he continued to live with the second one, and acknowledged her as his lawful wife, it was held that he not only ratified the second slave marriage, but disaffirmed the first.[5] But if the parties have to some extent cohabited after emancipation, yet repudiating the idea of marriage, and refusing to be married, this, it appears, does not amount to an affirmance of the slave marriage.[6]

§ 163 *b*. **The Children.** — The question of the legitimacy of the children of these slave marriages, since emancipation, is perhaps more difficult. It is hard to adjudge them bastards, while yet there are principles of the law which might seem at the first view so to require. Yet the Alabama court pronounced on this subject a decision which is to be commended for its equity, while still it may not be found to violate fundamental principle. According to this decision, marriages between slaves, and between free men of color and slave women, were not, during the existence of slavery, illicit connections, but were *quasi* marriages allowed by the law and approved by the church. The children of such marriages were not bastards, either at common law or by the statute law of Alabama. Therefore when such children, after emancipation,

[1] Estill *v.* Rogers, 1 Bush, 62; Stewart *v.* Munchandler, 2 Bush, 278. See The State *v.* Harris, 63 N. C. 1; Hampton *v.* The State, 45 Ala. 82.

[2] McReynolds *v.* The State, 5 Cold. 18.

[3] Stikes *v.* Swanson, 44 Ala. 633; and the remaining cases cited to this section.

[4] The State *v.* Adams, 65 N. C. 537.

[5] Johnson *v.* Johnson, 45 Misso. 595.

[6] The State *v.* Taylor, Phillips, 508.

were elevated to citizenship. their heritable blood was restored. Such children are, consequently. entitled to inherit the estate of their father, a free person of color, who died prior to emancipation, but whose estate remained in the hands of his administrator, and unclaimed by the State up to that date.[1] This decision was pronounced in 1870. In 1866, an adjudication was made by a learned county court judge in Illinois, going quite as far as this in favor of the offspring, and perhaps further. And as to the slave marriage itself, the broad doctrine is laid down, that it is good for all purposes upon emancipation.[2] When we reflect upon this doctrine, as to the children, we shall see, that, during slavery, the status of *bastardy* was as foreign to this institution as the status of legitimacy. If a slave was not the legitimate offspring of his natural parents who were living together in the way of marriage, still he was not a bastard. He had no foul or corrupt blood. The simple fact was, that he had no status, as to this particular, the one way or the other. The whole matter was a thing having no relation whatever to his condition as a slave. After emancipation, therefore, if the ordinary attributes of a freeman are conferred on him, and he must consequently be held to be either legitimate or illegitimate, no reason appears why he should be thrust into the vile class rather than the other, when his parents had done all which the circumstances would permit to make him legitimate.

[1] Stikes *v.* Swanson, 44 Ala. 633. According to a Mississippi decision, which is perhaps illustrative of the doctrine of the text, although a legacy to a slave may have been invalid, at the date of the testator's death, by reason of the legatee's disability, such legacy may be valid as a trust in the hands of the executor. And if the estate remains unsettled until the legatee's disability is removed by emancipation, the trust may be enforced by the courts. Hoover *v.* Brem, 43 Missis. 603.

[2] The decision is by Hon. James B. Bradwell, and it was rendered in his capacity of Probate Judge, of Cook county, which includes the city of Chicago. I have it before me in a pamphlet entitled "Validity of Slave Marriages." According to the headnote, "Henry Jones, a negro slave, was married in Tennessee, by a justice of the peace, to a colored woman the slave of another master, with the consent of their masters. They had one child while in slavery, the fruit of such marriage, called Matt. C. Jones — the mother died in slavery. Jones and Matt. C. were afterwards emancipated. Held, after the death of Henry Jones, that such marriage was not void: and that Matt. C. was the legitimate son of Henry Jones, and, as such, entitled to inherit his estate; notwithstanding the fact that his parents were slaves at the time of their marriage and his birth."

CHAPTER XI.

FRAUD, ERROR, DURESS.

§ 164. **Nature and Scope of the Discussion — How divided.** — The three grounds of nullity, Fraud, Error, and Duress, — deriving their significance severally from the fact that where they occur the will is under a constraint, consequently the consent which in form passes is no consent, — are so nearly allied in their nature as to be best discussed in one chapter. Still, we shall most conveniently treat of them separately in part. We shall consider, I. Fraud; II. Error; III. Duress; IV. Some Principles Common to the Three Impediments.

I. *Fraud.*

§ 165. **Difficulties of the Subject — How treated heretofore in this Work.** — There is no topic relating to marriage and divorce more difficult of treatment than this. The author freely acknowledges that, while in the first edition of his work he fully satisfied himself of the substantial correctness of the doctrines laid down in all his other chapters, there was a doubt over his mind with respect to this chapter. In the second and third editions he strove to improve this chapter, still it did not fully satisfy him. In the fourth edition he cast anew some parts of the chapter, enlarged the whole, and introduced some views which were not set down in the earlier editions. His hope is, that this revised treatment of the subject will satisfy his readers, as — he acknowledges with equal frankness as before — it does himself. At the same time he will here add, that, while the views of the judges often seem to lack clearness in the discussion of this subject, there have been put forth some judicial views, which, perhaps clearly enough, appear to

be in conflict with doctrines which will be maintained in this chapter.

§ 166. **Distinction whether Cohabitation has followed the Marriage or not — General Doctrine.** — A further preliminary proposition should be laid down; namely, that in reason, speaking now independently of authority, whatever of fraud, of error, or duress will vitiate any other contract, should ordinarily be received as sufficient to vitiate the mere marriage contract, whether executory or executed, viewed as a thing separate from the consummation which follows. Probably the authorities may hold this proposition to be good as applied to the contract *per verba de futuro*;[1] but, however this may be, the dicta of the judges generally, perhaps their decisions also, do not fully accord, as in reason they should, with this proposition when applied to that contract of present marriage which superinduces the status. If the contract of present marriage is followed by the parties living together as husband and wife, or even by copula falling short of this, where the copula is not brought about by any thing analogous to rape, a different principle may in some circumstances be involved. Especially if copula were allowed after knowledge of the impediment had reached the mind of the party allowing it, all objection on the ground of the impediment would ordinarily be waived thereby. This is a distinction of immense importance, as the question stands in principle;[2] and probably the not unfrequent failure of judges to take the distinction is the main cause of the very confused state of the law as it rests on the authorities. But the authorities are clear to the general conclusion, that fraud, error, or duress may render the marriage void.[3]

[1] See post, § 168.

[2] I might mention the case of Wier *v.* Still, 31 Iowa, 107, in illustration of the observations in the text. There, in a case of what would be deemed very gross fraud if the contract related to any other subject, the court refused to set aside the marriage, on the usual grounds as respects consummated marriages. The fact appeared in the case, that there had been no consummation and no cohabitation, but the attention of the court was not called to the significance of it. Had it been, I can have little doubt that this intelligent tribunal would have decided the other way. In essence, the undertaking which the woman entered into under the pressure of the fraud was, that she *would become* the man's wife; but she never submitted herself to be such, having instantly taken the alarm, and, I confess, I can discover no sufficient reason why she should not have been released from her promise and its consequences.

[3] 2 Kent Com. 76; Harford *v.* Morris,

§ 167. **Nature of the Fraud necessary — Character — Fortune, &c.** — When the question comes before a tribunal, whether a particular contract is void by reason of a fraud shown to have entered into its original constitution, many things may demand consideration. Among these things, the nature of the contract must be taken into the account; for what would avoid one kind of contract may not necessarily be sufficient to avoid another. In that contract of marriage which forms the gateway to the status of marriage, the parties take each other for better, for worse,[1] for richer, for poorer, to cherish each other in sickness and in health; consequently a mistake, whether resulting from accident, or indeed generally from fraudulent practices, in respect to the character, fortune, health, or the like, does not render void what is done.[2] To this conclusion the authorities all conduct us, but different modes of stating the reason for it have been adopted. Thus the qualities just mentioned are sometimes said to be accidental, not going to the essentials of the relation.[3] And Lord Stowell, after remarking that error about the family or fortune of an individual, though produced by disingenuous representations, does not affect the validity of the marriage, adds: "A man who means to act upon such representations should verify them by his own inquiries. The law presumes that he uses due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for the relief of a blind credulity, however it may have been produced."[4]

§ 168. **Continued — Why.** — Among the reasons assigned for

2 Hag. Con. 423, 4 Eng. Ec. 575; Countess of Portsmouth *v.* Earl of Portsmouth, 1 Hag. Ec. 355, 3 Eng. Ec. 154; Jolly *v.* McGregor, 3 Wilson & Shaw, 85; Burtis *v.* Burtis, Hopkins, 557; Scott *v.* Shufeldt, 5 Paige, 43; Perry *v.* Perry, 2 Paige, 501; Ferlat *v.* Gojon, Hopkins, 478; Clark *v.* Field, 13 Vt. 460; Hull *v.* Hull, 15 Jur. 710, 5 Eng. L. & Eq. 589; Respublica *v.* Hevice, 3 Wheeler Crim. Cas. 505; Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 104, 4 Eng. Ec. 485; Keyes *v.* Keyes, 2 Fost. N. H. 553; Robertson *v.* Cole, 12 Texas, 356; Sloan *v.* Kane, 10 How. N. Y. Pract. 66.

[1] Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 349; Scroggins *v.* Scroggins, 3 Dev. 535, 545.

[2] Ewing *v.* Wheatley, 2 Hag. Con. 175, 182, 183; Wakefield *v.* Mackay, 1 Phillim. 134, 137, note; Clowes *v.* Clowes, 3 Curt. Ec. 185, 191; 1 Fras. Dom. Rel. 230; Ruth. Inst. b. 1, c. 15, § 11, 12; 2 Kent Com. 77; Wier *v.* Still, 31 Iowa, 107.

[3] 1 Fras. Dom. Rel. 230.

[4] Wakefield *v.* Mackay, supra.

the doctrine of the last section, the former of the two mentioned appears to be the more worthy of regard; namely, that the nature of marriage forbids its validity to rest upon any stipulations concerning these accidental qualities.[1] If the man should in words agree with the woman to be her husband only on condition of her proving so rich, so virtuous, so wise, so healthy, of such a standing in society; yet, if he afterward celebrates the nuptials on her representing herself to possess the stipulated qualities, while in truth she is destitute of them; still, in such celebration, he says to her in effect and in law, "I take you to be my wife, whether you have the qualities or not, whether you have deceived me or not." In other words, he waives the condition. To carry such a condition into the marital relation would violate its spirit and purpose, and be contrary to good morals. The objects of marriage, rightly understood, transcend all considerations of the kind mentioned; and, if the purchaser of a jewel could not annul the bargain by reason of the seller sending it to him in a plain envelope of paper, instead of a figured one, as was contemplated, — surely the husband should not be permitted to repudiate his marriage, though he should discover an absence of some secondary thing, to which he had given his affections, instead of placing them where he had promised. Herein the law regulating the executed contract of present marriage differs from that governing the agreement of future marriage; for, in the latter, the parties to it seem so far to stipulate concerning the accidentals as to enable either to avoid the contract where any fraud as to them has been discovered.[2] Perhaps the rule thus stated, applied to the executory contract, is well; but, applied to the executed contract, — meaning the contract executed by consummation and cohabitation as well as by the outward ceremony, — it would degrade a high and holy relation to a level with things of mere mercantile consideration.

§ 169. **Formal Marriage without Consummation, continued.** — These general views will assist us when we proceed now to examine a few specific points. And in the first place, let us

[1] Page on Div. 158.

[2] See Addison on Contracts, 580–585; Chitty on Contracts, 538–541.

consider more minutely the proposition, that, where a marriage has been brought about by fraud, it should be vacated if the fraud was such as would lead a court of equity to vacate any other contract, provided there has been no carnal consummation of the marriage and no apparent cohabitation under it. This proposition is one rather of legal reason than of adjudication. Yet, in legal reason, it stands firm. There is no legal reason possible to be assigned, why the mere pronouncing of the parties husband and wife by a justice of the peace or a minister of the gospel should make that valid which in its nature is no contract, the will having been overcome by fraudulent pretences, and not really assenting, if, without such formal pronouncing, it would be held to be no contract. If the law took cognizance of marriage in respect to some mysterious religious effects produced by the words or benediction of a priest, the result might be legally otherwise. But in this country at least, probably in England also, the law takes no such cognizance. And while in most of our States a marriage may be good without any ceremony either religious or civil, requiring the presence of any official person, there is believed to be no State in which, though the presence of an official person may be required, a mere civic personage, as a justice of the peace, is not just as competent to perform the ceremony as an ecclesiastic. Indeed, we have no ecclesiastical personages in this country, in any sense recognized by the law; because we have not now, neither did we ever have, any established religion.

§ 170. **Continued — Kind and Extent of the Fraud.** — What fraud, in kind and amount, should be deemed sufficient to vacate a marriage within the rule suggested in our last section, we may not be able to state in a single sentence. There are, in our books, decisions concerning the fraud which will serve as a defence to an action for the breach of the promise of marriage, and these perhaps may help us somewhat upon this point. But these decisions are apt to turn also upon the question of the plaintiff's conduct subsequently to the promise made; and therefore to this extent they are not in point. Swinburne says, that one of the causes for which spousals may be dissolved is, "whenas the party doth, after the contract made, commit fornication, for the innocent party is at liberty

and may dissolve the contract."[1] But this cause, in most of our States, would be a ground of divorce, yet it would nowhere justify a decree pronouncing the marriage to have been originally void. If, however, a man enters into a promise of marriage with a woman, and, before the marriage is celebrated, he learns that at the time of the promise she was unchaste, the fact not having come to his knowledge before, this will justify him in breaking the promise, and she can recover nothing against him by reason of its breach.[2] And to the writer of these volumes it seems highly reasonable that the rule should be the same, when, after marriage celebrated, but before consummation, the same fact is discovered, and the man brings his suit to have the marriage declared void. But it has been held, in an action for breach of promise, that proof of habitual profanity of the plaintiff, and her threats to take the lives of the defendant's connections, though unknown to the defendant at the time when he made the promise, would not suffice in bar of the action, though it would go to the mitigation of damages. And the judge observed: "No case has been found which sustains the principle, that a breach of the criminal law in the plaintiff, accruing after the promise, or before the promise, of which the party contracting is ignorant, will necessarily be a bar to a suit."[3] And plainly, in a suit to have the marriage set aside for the fraud, the plaintiff could not avail himself of matter which, were he defendant in an action for the breach of the promise, would be receivable only in mitigation of the damages.

§ 171. **Continued — Party's Knowledge of the Fraud.** — The foregoing propositions are introduced only to illustrate the general doctrine; they do not exhaust the subject. And it should be observed, that, in these cases, as in all other cases of fraud, if the party complaining knew of the matter of which he complains at the time he made the promise, he can have no relief. Indeed, in such a case, there is no fraud.[4]

[1] Swinb. Spous. 2d ed. 237. And see Young *v.* Murphy, 3 Bing. N. C. 54, 3 Scott, 379, 2 Hodges, 144.

[2] Irving *v.* Greenwood, 1 Car. & P. 350; Foote *v.* Hayne, 1 Car. & P. 545; Young *v.* Murphy, supra; Woodard *v.* Bellamy, 2 Root, 354; Willard *v.* Stone, 7 Cow. 22; Berry *v.* Bakeman, 44 Maine, 164; Bell *v.* Eaton, 28 Ind. 468.

[3] Berry *v.* Bakeman, supra.

[4] Butler *v.* Eschleman, 18 Ill. 44; Berry *v.* Bakeman, 44 Maine, 164.

§ 172. **Continued — The Decisions. — Attention of Court not called to this Distinction.** — The books contain various cases in which, according to the facts appearing, there had been no consummation of the marriage at the time when the suit was brought to set it aside by reason of the fraud.[1] But, as this particular circumstance seems not, in these cases, to have impressed itself upon the minds of the judges or generally to have been adverted to by them, the writer deemed it not best to separate these cases from the others to be considered in subsequent sections of this chapter. But in the subsequent sections he will assume that the marriage has been consummated, unless the contrary is in the particular instance stated.

§ 173. **Conspiracy — (Principal as to Fraud of Agent,** in the Note).— A species of fraud, sometimes met with, is conspiracy. There seems to be ground for saying, that, if the party against whom the marriage is sought to be set aside was not one of the conspirators, — as, where a parish by fraudulent contrivances procured the marriage of a female pauper, for the purpose of changing her settlement to another parish, — the conspiracy will not make the marriage invalid.[2] Lord Stowell,

[1] And see ante, § 166 and note.

[2] Rex *v.* Birmingham, 8 B. & C. 29, 2 Man. & R. 230; Rex *v.* Tarant, 1 Bott P. L. 338, 2 Bott P. L. 68. See post, § 175. If an executed marriage were like any other contract, some doubt might arise as to the correctness of this proposition. For when one takes the benefit of another's act, he necessarily adopts the act entire, including the fraud, if it be fraudulent. Mason *v.* Crosby, 1 Woodb. & M. 342, 353, 358, and the cases there cited. But see Fisher *v.* Boody, 1 Curt. C. C. 206. If one supplies another with the means of perpetrating a fraud in his name against a particular third person, and the fraud is perpetrated by the means contemplated, but against other parties, he is liable. Wilson *v.* Green, 25 Vt. 450. Fraud between the parties to a suit, and a third person, to defeat the rights of creditors of the latter, cannot be pleaded in bar to the action. Moore *v.* Thompson, 6 Misso. 353. See further, as to the distinction between fraud practised by one of the parties, and fraud practised by a stranger, Clute *v.* Fitch, 25 Barb. 428; Killinger *v.* Reidenhauer, 6 S. & R. 531; Sumner *v.* Murphy, 2 Hill, S. C. 488; Reichart *v.* Castator, 5 Binn. 109; Osborne *v.* Moss, 7 Johns. 161; Findley *v.* Cooley, 1 Blackf. 262; Hendricks *v.* Mount, 2 Southard, 738; Harry *v.* Graham, 1 Dev. & Bat. 76; Swanzy *v.* Hunt, 2 Nott & McC. 211. In New York it was laid down, that a principal, who undertakes to enforce a contract, is bound by the unauthorized representations made by his agent to induce the contract, although such agent did not know at the time whether the representations were true or false. And Comstock, C. J., referring to the facts of the particular case in controversy, said: "There is no evidence that the defendant authorized or knew of the alleged fraud committed by his agent Davis, in negotiating the exchange of lands. Nevertheless, he cannot enjoy the fruits of the bargain without adopt-

however, apparently referring to cases in which the party proceeded against was not one of the conspirators, observed: "I will not lay it down, that, in no possible case, can a marriage be set aside on the ground of having been effected by a conspiracy. Suppose three or four persons were to combine to effect such a purpose by intoxicating another, and marrying him in that perverted state of mind, this court would not hesitate to annul a marriage on clear proof of such a cause, connected with such an effect. Not many cases occur to me in which the co-operation of other persons to produce a marriage can be so considered, if the party was not in a state of disability, natural or artificial, which created a want of reason, or volition, amounting to an incapacity to contract." [1]

§ 174. **Continued.** — If we look at this question of marriage effected by a fraudulent conspiracy, in the light of principle, we shall draw the following distinction. When the marriage is the voluntary act of the parties to it, proceeding from voluntary choice, though at the same time deceitful practices by third persons led them to this choice, neither of them being cognizant of the fraud, it is a perfect marriage, as perfect as any possibly can be. But if one of them was cognizant of the

ing all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing he cannot claim immunity on the ground that the fraud was committed by his agent and not by himself." Bennett *v.* Judson, 21 N. Y. 238, 239.

[1] Sullivan *v.* Sullivan, 2 Hag. Con. 238, 246. But further on, in the same case, p. 247, this learned judge observed: "Suppose a young man of sixteen, in the first bloom of youth, the representative of a noble family, and the inheritor of a splendid fortune; suppose that he is induced, by persons connected with a female in all respects unworthy of such an alliance, to contract a marriage with her, after due publication of banns in a parish church, to which both are strangers; I say the strongest case you could establish, of the most deliberate plot, leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this court to release him from chains, which, though forged by others, he had riveted on himself. If he is capable of consent, and has consented, the law does not ask how the consent has been induced. His own consent, however procured, *is his own act*, and he must impute all the consequences resulting from it, either to himself or to others whose happiness he ought to have consulted, to his own responsibility for that consent. The law looks no further back." See also, on this subject, Rex *v.* Minshull, 1 Nev. & M. 277.

fraud, and so voluntarily availed himself of it, whether he was a party to the originating of it or not, it should be deemed his fraud; and, if sufficient in degree and kind, should entitle the other party to have the marriage set aside.

§ 175. **Continued.** — The distinction suggested in the last section enables us to see how the following case was correctly decided; while, if the defendant had not been cognizant of the fraud, the result would have been the other way; unless, indeed, the duress alleged, or want of mental capacity in the plaintiff, had been established to the satisfaction of the court. The case arose in Vermont, being a suit brought by the woman to have her marriage declared void; and the opinion, delivered by Redfield, C. J., leading to the decree sought, sufficiently explains the facts. "We are satisfied," said he, "that the form of marriage was brought about between these parties, chiefly through the instrumentality of certain inhabitants of Moretown, who had charge of maintaining the town's poor, for the purpose of changing the settlement of the petitioner; and that to effect this, they promised Wyethe [the husband] $100, and paid him $60; that his purpose was not to contract, in good faith, a marriage, but to get money, and revenge an imaginary grievance against Middlesex, and abandon the petitioner, which he did in about three weeks. She is a cripple, feeble both in body and mind, and was wholly at the disposal of those who had her in charge. It is difficult to lay down any general rule in regard to the precise character of fraud which will render null a marriage contract. But we are reluctant to say that such a transaction as the present is to receive the countenance of the courts of the State. It would, we think, be of evil example. The transaction possesses no one feature of a marriage contract but the ceremony. The cohabitation, so long as it continued, seems to have been, on the part of the petitioner, the result of the general imposition; and on the part of the defendant, a part of the attempted villany. A decree of nullity, if it have no other good effect (and, as to the parties, it seems to be of no great importance, both being virtual paupers), will deprive the conspirators of the wages of their iniquity, and be of good example to others. We are not satisfied there was any such duress in the case as to

justify a decree of nullity. But one of the chief actors testifies that he told the petitioner the laws were so altered that the town authority said they had a right to marry paupers to whom they saw fit; and the petitioner testifies that she believed it, and supposed that if she refused to submit to the marriage she should be left to starve. It is impossible to know how much such badinage might have influenced so simple a creature in the outset; but we are not satisfied she finally acted under the delusion, and still she might have done. Petition granted." [1] Perhaps it is material further to consider, in looking into this case, that the defendant never intended real matrimony, though he went through the form of a marriage; and that, therefore, certain principles, to be considered in another chapter, concerning the forms of marriage where the intent to marry does not exist,[2] operate in conjunction with the doctrine of fraud treated of in this chapter.

§ 176. **Continued.** — If a man and woman combine to marry each other for the purpose of injuring third persons in their property interests, this combination does not render the marriage void as against those third persons. The relation assumed being agreeable to the parties, it cannot be interfered with by others; neither can others, whatever the motives prompting to it, avoid any of the collateral consequences to themselves which arise legally out of the relation. Therefore when a widow, having a property interest terminable with her widowhood, which interest was levied on by her creditors, married a poor drunken man to defeat the levy and cause the estate to become vested immediately in her children, she not intending to cohabit, and never cohabiting in fact, with this man, the court held, that her creditor could object neither to the marriage nor to its consequences. Said McKinney, J.: "If a marriage may be annulled for fraud, it must be such fraud as operates upon one or other of the immediate parties to the contract, and has the legal effect of vitiating the contract between the parties, *ab initio*. But, as respects strangers, fraud cannot be predicated of a contract which the immediate parties thereto may lawfully enter into, which no principle of municipal law forbids, or can restrain the consum-

[1] Barnes *v.* Wyethe, 28 Vt. 41. [2] Post, § 233 et seq.

mation of." [1] Still, we may observe, that, if neither the man nor the woman meant ever to cohabit as husband and wife, or to have any sexual connection, at the time of going through with a form of marriage, the form itself would seem to be a mere idle ceremony, and not to superinduce the marriage status.[2]

§ 177. **The Statutes, how construed.** — The question of the construction of those statutes which authorize decrees of nullity for the cause of fraud, is of the same class with several others discussed in previous sections.[3] It will be alluded to also, incidentally, in the next section. It may be said, in general terms, that such statutes are to be construed, where their provisions lack such specific words as would plainly indicate a different construction, as simply giving to the court a jurisdiction to grant divorces for fraud, in those cases only which, according to the principles of our unwritten law on the subject, will authorize such divorces. At the same time it occurs to the author to suggest, that, while we should thus recur to the *principles* of our unwritten law, a court might, considering the general course of public sentiment, and the progress of this department of our jurisprudence, interpose with its decree, though the judge should doubt, or more than doubt, whether an English ecclesiastical tribunal would, at the time of the settlement of this country, have rendered the like relief under the pressure of the same facts.[4]

§ 178. **Continued — "Fraudulent Contract" — Marriage of One arrested for Bastardy — (Impotence — Canonical Impediments, &c., in the Note).** — The Connecticut court, in seeking a construction for the statute of that State, which allowed divorce for "fraudulent contract," made the following just observations: "The phrase *fraudulent contract*, in common parlance, admits of great latitude of construction, and will include all those deceptive acts to which the sexes too frequently have recourse, with a view to obtain what they consider an advantageous marriage connection; by setting off their persons, characters, tempers, circumstances, and connections in a too favorable light; or by

[1] McKinney *v.* Clarke, 2 Swan, Tenn. 321, 325.

[2] Post, § 243–245.

[3] Ante, § 71, 90, 96, 120, 137, 145.

[4] And see Reynolds *v.* Reynolds, 3 Allen, 605.

professions of ardent affection, which they either may not feel, or not in a degree equal to what they profess. These acts, though they meet with various degrees of indulgence, according to circumstances, are still inconsistent with truth and sincerity; and may be, and often are, productive of serious mischief; they partake of the nature of fraud, and a marriage grounded on them is, in a sense, a *fraudulent contract.* If the phrase be taken in this large sense, the statute would degrade the marriage contract, which, in its original design and institution, was to continue indissoluble during the joint lives of the correlates, and which is a main pillar on which society itself is founded, to a level with the most trifling bargains. The legislature can never be intended to do this." Therefore, after deciding that the statute did not refer to the fraud thus pointed out, but to such as the books of the law had already recognized as invalidating the marriage, the court further held, that a decree annulling the relation on this ground could not be granted to a woman, who, being with child, had caused the putative father to be arrested under the bastardy process; and he, for the sole purpose of procuring his discharge from the arrest, had married her with the intent of immediately deserting her, which intent he carried into execution.[1] It is in place, however, to

[1] Benton *v.* Benton, 1 Day, 111. While the language of the court, as quoted in the text, is doubtless a correct exposition of the law, some further observations which fell from the judge are clearly erroneous. He said: "The phrase *fraudulent contract,* as applied to the subject of marriage and divorce, in the books, has obtained an appropriate and technical meaning; and is taken to imply a *cause of divorce which existed previous to the marriage,* and such a one as rendered the marriage unlawful *ab initio;* as *consanguinity, corporal imbecility,* or the like; in which case, the law looks upon the marriage as null and void, being contracted *in fraudem legis,* and decrees a separation *a vinculo matrimonii.*" And, therefore, upon the ground of fraud, the courts of Connecticut have taken jurisdiction to grant divorces for impotence. Ferris *v.* Ferris, 8 Conn. 166. But they appear to overlook entirely the class of frauds which we are considering in this chapter. Now, it is not easy to see how fraud is involved in a marriage within the prohibited degrees of consanguinity. Impotence may be regarded as a species of fraud in law; yet, according to the better doctrine, courts of equity, though they will set aside marriages procured by fraud, where there is no other competent jurisdiction, will not on the ground of fraud divorce parties for impotence. Burtis *v.* Burtis, Hopkins, 557; Perry *v.* Perry, 2 Paige, 501; ante, § 72. Upon this matter, Judge Reeve, of the same State of Connecticut, has observed: "Certainly, if nothing more was meant by the term 'fraudulent contract' [in the statute] than imbecility, it is a very awkward expression to convey that precise, definite idea which is affixed to the term imbecility. If the legis-

observe of this decision, that, though the language above quoted is a correct exposition of the general doctrine of fraud in marriage, still, — according at least to the Scotch law, to be explained in another chapter, — if the marriage were not formally celebrated, and perhaps if it were, the absence of intent to marry, it not having been afterward consummated, would render it void.[1] And upon this question also, the reader is referred to some observations found in the earlier sections of this chapter.[2]

§ 179. **False Representation of Chastity — Marrying a Prostitute — Ayliffe as an Authority.** — If a woman who has been defiled pretends to be a virgin, and a man marries her on his faith in this pretension, the marriage is nevertheless good, even though she is a common prostitute.[3] This proposition, while it is doubtless correct, does not rest upon a very firm basis of authority in this country and England, as concerns a marriage with a common prostitute; though it is well settled in Scot-

lature meant to convey the same idea by the term, which it ordinarily imports, I apprehend it was a very natural provision. If it be founded in justice that the contracts which represent ordinary matter should be treated as void when obtained by fraudulent practices, why, then, should a contract, the most important that can be entered into, be deemed inviolable, when obtained by such fraudulent practices? A man, by the foulest fraud, gets possession of the property of his neighbor. A contract thus basely obtained is not only void, but, in many instances, the obtaining of it is a felony. The common sense of mankind must revolt at the idea, that, when a man by the same abominable fraud has obtained the person of an amiable woman and her property, the law should protect such contract, and give it the same efficacy as if fairly procured. The truth is, that a contract which is obtained by fraud is, in point of law, no contract. The fraud blots out of existence whatever semblance of a contract there might have been. A marriage procured without a contract can never be deemed valid. There is no more reason for sanctioning a marriage procured by fraud, than one procured by force and violence. The consent is as totally wanting, in view of the law, in the former as in the latter case. The true point of light in which this ought to be viewed, I apprehend, is, that the marriage was void *ab initio;* but it is necessary to have a divorce by the court, since the marriage has been celebrated, that all concerned may be apprised that such marriage has no effect. Upon the same principle that chancery decrees contracts unfairly obtained void, all the apprehension that is created in the minds of conscientious men, of the illegality of separating husband and wife, is dissipated. If this view be correct, they never were husband and wife, one essential ingredient to the contract being wanting, namely consent." Reeve Dom. Rel. 206. But this view appears not to have convinced the tribunal of final resort in that State. Guilford *v.* Oxford, 9 Conn. 321, 327.

[1] Post, § 237, 238.

[2] Ante, 166, 169–171, 176.

[3] Rogers Ec. Law, 2d ed. 644; 1 Fras. Dom. Rel. 231; Ayl. Parer. 363; Swinb. Spousals, 2d ed. 152; Hedden *v.* Hedden, 6 C. E. Green, 61; post, § 184.

land, and one cannot easily read the English books without being convinced that it is the doctrine of the English courts also.[1] The English dicta, for there appears to be no decided case, seem all to have come down from Ayliffe, who states the doctrine in terms not very conclusive in themselves, and still further weakened by the fact, that he is seldom to be relied upon to sustain, alone and uncorroborated, a doubtful proposition. His "Parergon Juris Canonici *Anglicani*" is made up very much of the disquisitions of the Roman canonists, which had no binding force in England. It has been strongly urged against this doctrine, that chastity cannot be discovered before marriage, while every other personal quality can. Mr. Page supposes, that, under the statute of Ohio, the courts would set aside such a marriage as we are considering; but he rests his opinion merely on the reason of the thing, not on authority.[2] On principle, however, it would seem, that, if a woman has been a common prostitute, and has reformed, though she conceals by artifice her former misconduct, the marriage should be good. This, indeed, follows from the well-settled doctrine, that antenuptial incontinence is no ground for divorce. Otherwise a woman of strong passions, led astray by them, could have no hope of reform; but the law should encourage virtue.[3] So the law should presume, from the fact of marriage, that the woman had abandoned unlawful pleasures. In this country, where divorces *a vinculo* are granted for adultery, it is of little consequence whether the marriage of an unreformed prostitute, to a person whom she deceives as to her character, is to be deemed void from the beginning, or not; since it would be annulled on proof of the subsequent adultery.[4] There seems,

[1] See Perrin *v.* Perrin, 1 Add. Ec. 1, 2 Eng. Ec. 11; Reeves *v.* Reeves, 2 Phillim. 125, 127, 1 Eng. Ec. 208, 209; Graves *v.* Graves, 3 Curt. Ec. 235, 7 Eng. Ec. 425, 427; Best *v.* Best, 1 Add. Ec. 411, 2 Eng. Ec. 158; where it is held, that antenuptial incontinence is no ground of divorce.

[2] Page on Div. 161.

[3] See Scroggins *v.* Scroggins, 3 Dev. 535, 545. See also ante, § 170, 171.

[4] "It has been sometimes supposed, that, if a man chooses to marry an immodest woman, he cannot afterwards free himself from her by reason of her unchastity. But there is no such law. Whatever the previous life of a woman may have been, she binds herself by marriage to chastity, and if she break the conditions of marriage, her husband is entitled to claim its dissolution. But, on the other hand, a husband is at all times bound to accord to his wife the protection of his name, his home, and his society, and is certainly not the less so in cases where the previous life

therefore, to be no urgent reason here for holding the marriage under consideration void, — a doctrine which would merely render innocent children illegitimate.

§ 179 *a*. **Continued.** — As already intimated, there is undoubtedly room to draw a distinction between the marriage of a street strumpet and that of a woman who may have committed a single act or series of acts of private incontinence. A case of the latter complexion was brought before the Michigan court; it was one not calculated to win favor, and happily it did not. The facts were, that, after a marriage of twenty years' standing, and cohabitation under it, and the bringing up of children, a husband brought his bill to annul the marriage by reason of an alleged fraud of this sort. The bill set out, that, before marriage, the chastity of his wife was made by him a subject of diligent inquiry among her relatives, and also in her presence; but, though he used due diligence, he could learn nothing on the subject through his inquiries of others, yet she made to him specific assertions which were false, on the strength of which he married her. Having now ascertained that she was guilty of antenuptial incontinence, he prayed for relief. And it was held that the allegations of the bill, should they be proved, were not such as would justify the court in setting aside the marriage. Said Campbell, J.: "The only cases cited on the argument, which have been supposed to favor divorces for antenuptial misbehavior, are cases where there was actual pregnancy at the time of the marriage. Without attempting to examine at length into the reasoning of these decisions, it is sufficient to say that such circumstances introduce very different evils from those attending on previous fault alone. They have a direct tendency to confuse inheritances, and create disputes of legitimacy. If such a case should be presented, we should be called upon to decide a question not presented by this record." [1]

of his wife renders her peculiarly accessible to temptation." Lord Penzance in Baylis *v.* Baylis, Law Rep. 1 P. & M 395, 397.

[1] Leavitt *v.* Leavitt, 13 Mich. 452, 458. In a subsequent case, it seems to be strongly implied that the Michigan court would hold the usual American doctrine on the subject of antenuptial incontinence, — to be explained in succeeding sections. Dawson *v.* Dawson, 18 Mich. 335. In Maryland, I am sorry to say, there is a statutory provision authorizing divorce from the bond of matrimony "when the female before marriage has been guilty of illicit car-

§ 180. **How when the Woman is pregnant.** — Connected, therefore, with the question discussed in the last two sections, is another, which, in various aspects, has arisen in several of the American cases. It is, whether or not, after a marriage and consummation, a man can have the marriage declared void for fraud, if he discovers that, at the time of its celebration, the woman was pregnant by a person other than himself. The question is here put in this general way, for the sake of convenience, though there have been drawn lines of distinction, which, if we admit their correctness, will place some of the cases embraced within the general language of the question on the side where the relief is given, and others of them on the other side. A case which, though not the earliest in point of time, may perhaps be deemed a leading one on the subject, occurred in Massachusetts, as follows: —

§ 181. **Continued.** — A statute authorized a sentence of nullity or divorce "when a marriage is supposed to be void, or the validity thereof is doubted, either from fraud or any legal cause;"[1] and, upon this statute, a libel for nullity was brought by a supposed husband, wherein the following facts were alleged: that at the time of the marriage he was "only," in the word of the report, "seventeen years of age, and the respondent was thirty years, or over; that he had been acquainted with her for only about six weeks; that he was induced to marry her by means of her false and fraudulent representations that she was a chaste and virtuous woman,

nal intercourse with another man, the same being unknown to the husband at the time of the marriage." 1 Md. Code of 1860, 76, § 25. Now, if a Maryland girl has committed a single private sin of this sort, and has washed it out with her tears, and Heaven has forgiven her, then, if her hand is asked in marriage, what is she to do? Why, of course, before the courtship proceeds further, she is to confess all to her lover, and put it in his power to ruin her. But this is not all. She is not safe to marry without proof of the confession. If she calls in her mother, the chances are that the witness will die before she does. Then, if she calls in her younger brother, he may die first. If she puts the confession into writing, it may be lost or destroyed. There should be established in every county a public registry for such things. Whether there is I have not searched the Maryland statutes sufficiently to ascertain. But I am able to say, that this sort of provision is not common in the statutes of our States. A statute of Virginia, however, going less far, provides for a divorce where the woman had before marriage, without the knowledge of the man, been "notoriously a prostitute." Code of 1860, p. 530, § 6.

[1] Stat. 1855, c. 27; re-enacted, Gen. Stats. c. 107, § 4.

which he believed to be true; and that her friends with whom she then lived represented to him, at her procurement, that she was honest and virtuous; but in truth she was not virtuous, but was at the time of the marriage pregnant with child by some person to the libellant unknown, of which child she was delivered on or about the 7th of March, 1857 [the date of the marriage was Oct. 11, 1856], and the libellant did not thereafter live or have any intercourse with her." The reader sees, that, according to this allegation, she was some four months along in her pregnancy at the time of the marriage. To this libel the respondent demurred; and so the question was, whether, assuming these facts to be all and severally true, the libellant was entitled to a sentence of nullity. The court held that he was, and so overruled the demurrer.[1]

§ 182. **Continued.** — A decision ordinarily contains, as we find it reported, three things; namely, the result as resting upon the facts; the general propositions contained in the opinion; and the reasoning based on those propositions. These may be all such as should be approved, as things pertaining to our general jurisprudence; or one or two of them may be such, while the other or the rest are not. And perhaps we cannot better examine some points connected with our present topic, than in connection with this case. We shall consider the general principles first; next, the reasoning; lastly, the result.

§ 183. **Continued — General Principles.** — Said the learned chief-justice, who delivered the opinion of the court: "It would be difficult, if not impossible, to lay down any general rule or definition which would comprehend all cases coming within the range of the legal import of the word fraud. A learned writer terms fraud *hydra multorum capitum*. An inquiry into the fraudulent intent and conduct of parties necessarily involves an investigation of facts; and, as no two cases are precisely alike in their circumstances, it follows that the question, whether fraud exists sufficient to vitiate a contract, always depends very much on the nature of the transactions, the means of information possessed by the parties, and their relative situation and condition toward each other. The only

[1] Reynolds *v.* Reynolds, 3 Allen, 605.

general rule which can be safely stated is, that, to render a contract void on the ground of fraud, there must be a fraudulent misrepresentation or concealment of some material fact. What amounts to such misrepresentation or concealment, and whether the fact misstated or withheld is material, are questions to be decided according to the circumstances developed in each case, as it arises for judicial determination."[1] It seems to the writer of these volumes that the observations thus quoted are eminently just; and that, in the nature of things, there can be no one exact measure which can be readily applied to a case of fraud in marriage, to determine whether it is long enough, or broad enough; neither, on the other hand, can there be any exact test of the quality of the alleged fraud, to determine whether it is of the kind which vitiates the marriage or not. Suppose, in the case under consideration, we start with the proposition, that mere antenuptial incontinence is no ground for a decree of nullity: the result plainly is, if we confine ourselves to the quality of the act, that being pregnant and concealing the pregnancy is no ground; since the pregnancy is the natural and probable consequence of the incontinence. And if we look at the moral quality of the act, surely she who, in a moment of weakness and confiding love, yields to a single embrace, which may produce pregnancy, is immeasurably less culpable than the common prostitute, who, as we have seen, has her day for repentance, and is therefore permitted to contract indissoluble marriage with a man kept in ignorance of the prostitution.

§ 184. **Continued.** — Again, the learned judge proceeds to show, that, in these questions of fraud in marriage, the peculiar nature of the marital relation must be borne in mind, and that "no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice."[2] And he adds: "Nothing can avoid it which does not amount to a fraud in the *essentialia* of the marriage relation. And as mere incontinence in a woman prior to her entrance into the mar-

[1] Reynolds *v.* Reynolds, 3 Allen, 605, 606. Bigelow, C. J.

[2] In support of this view, see ante, § 166–168; Wier *v.* Still, 31 Iowa, 107.

riage contract, not resulting in pregnancy, does not necessarily prevent her from being a faithful wife, or from bearing to her husband the pure offspring of his loins, there seems to be no sufficient reason for holding misrepresentation or concealment on the subject of chastity to be such a fraud as to afford a valid ground for declaring a consummated marriage void."[1] These observations are eminently just.

§ 185. **Continued — The Reasoning.** — Having laid down the foregoing propositions, the learned judge proceeded to distinguish this case from one of mere antenuptial incontinence. "The latter," he said, "relates only to her [the woman's] conduct and character prior to the contract, while the former touches directly her actual present condition and her fitness to execute the marriage contract, and take on herself the duties of a chaste and faithful wife. It is not going too far to say, that a woman who has not only submitted to the embraces of another man, but who also bears in her womb the fruit of such illicit intercourse, has during the period of her gestation incapacitated herself from making and executing a valid contract of marriage with a man who takes her as his wife in ignorance of her condition and on the faith of her representation that she is chaste and virtuous."[2] If this proposition is to be understood as meaning any thing more than to state the conclusion to which the court had come, — the conclusion being matter to be discussed further on, — it requires here some observation. We must, in looking at the law of marriage, view it as a whole thing, harmonious, and not discordant. Now, when we come to examine the question of impotence, we shall see, that a woman who is incurably barren, who can never be the mother of children, is in a condition to contract a valid marriage with a man who takes her supposing her competent to become a mother, if she has the physical capacity to submit to a consummation of the marriage. Even if she has not, but is curable, so that at any time after the marriage ceremony is performed, whether in one month or one year, she can by any treatment, — as, for instance, the performance of a surgical operation, — be made capable of receiving the

[1] Reynolds *v.* Reynolds, 3 Allen, 605, 607, 608.

[2] Reynolds *v.* Reynolds, 3 Allen, 605, 609.

embraces of her husband, the marriage is good. And if the woman has "incapacitated herself," by her own voluntary fault or wickedness, this makes no difference.[1] Clearly, therefore, in a case such as the court was considering, the mere present incapacity of the woman, either for sexual intercourse, or for becoming pregnant by the husband, could furnish no ground for pronouncing the marriage void for the fraud.

§ 186. **Continued.** — But the learned judge proceeded: "A husband has a right to require that his wife shall not bear to his bed aliens to his blood and lineage. This is implied in the very nature of the contract of marriage. Therefore a woman who is incapable of bearing a child to her husband at the time of her marriage, by reason of her pregnancy by another man, is unable to perform an important part of the contract into which she enters; and any representation which leads to the belief that she is in a marriageable condition is a false statement of a fact material to the contract, and on well-settled principles affords good ground for setting it aside and declaring the marriage void."[2] The answer to a part of this reasoning, if the comments which the writer is here making be properly called such, was given in our last section. But the learned judge proceeds to develop the proposition, thus alluded to, that, since the child born of the woman is presumed to be the husband's, though begotten out of wedlock, therefore, unless a decree of nullity were allowed, the husband would be placed in a legal and social predicament of an extremely unpleasant nature. "The rule of the common law is," he observed, "that, if a man marry a woman who is with child, it raises the presumption that the child with which she is pregnant was begotten by him. This presumption is founded on the supposed acknowledgment of paternity by the subsequent act of marriage; and, although such presumption is liable to be rebutted, yet in the absence of proof it stands.[3] A man, therefore, who has contracted a marriage with a woman under such circumstances, if he could not obtain a divorce on the ground of fraud, would

[1] Post, § 321 et seq., 332, 333, note.

[2] Reynolds *v.* Reynolds, 3 Allen, 605, 610.

[3] Referring to Hemmenway *v.* Towner, 1 Allen, 209; Phillips *v.* Allen, 2 Allen, 453.

be subjected to the painful alternative of disowning the child, and thereby publishing to the world the shame of her who was still to remain his wife, or suffer the presumption of legitimacy to stand, and admit the child of another to share in his bounty and receive support in like manner as his own legitimate children. There is no sound rule of law or consideration of policy which requires that a marriage procured by false statements or representations and attended with such results upon an innocent party should be held valid and binding on him."[1]

§ 187. **Continued.** — With regard to the presumption raised by the law, that a child begotten before marriage, and born afterward, is the offspring of the husband, the impression is strong upon the mind of the writer that this presumption is held less stringently by some tribunals than by others. Where the birth is soon after the marriage, all courts hold it to be almost overpowering; because, in such a case, the plain inference is, that the husband knew of the pregnancy, and that he would not have consented to enter into the marriage unless he were conscious of having had previous intercourse with the woman.[2] But it has been deemed, that, if at the marriage the pregnancy is probably unknown (as it must be usually where the woman is but four or five months advanced); where the parties' acquaintance commenced too late for the husband to be the father of the child afterward born; where the common opinion in the vicinity assigns the child to another man; where the child grows up, not in the husband's house, nor looking on him as a father, nor being considered as his child; and where the woman's reputation is not good, — the presumption of legitimacy is strongly repelled.[3] And it has been even assumed, that, in such a case, there is no presumption of paternity on the part of the husband. "The knowledge of the situation of the party," said a learned judge, "constitutes the ground of the presumption."[4]

[1] Reynolds *v.* Reynolds, supra, p. 610.

[2] Page *v.* Dennison, 1 Grant, 377, 5 Casey, 420; The State *v.* Herman, 13 Ire. 502; Stegall *v.* Stegall, 2 Brock. 256. See Bowles *v.* Bingham, 2 Munf. 443, 3 Munf. 599.

[3] Stegall *v.* Stegall, supra.

[4] Baker *v.* Baker, 13 Cal. 87, 99. And see post, § 548.

§ 188. **Continued.** — But it is seldom, in our jurisprudence, that rights are made to turn, as matter of law, on the ability or want of ability to prove the facts assumed to be involved in the question. And especially in such a case as this, if a man can prove himself not to be the father of the child, when he brings his suit to have the marriage declared void, he can prove the same fact when the question is one of legitimacy. The matter, therefore, which remains is, — What effect shall the unpleasant predicament of the husband, in such a case, have as an element in the legal decision? Were it known to everybody, — to all the world, — except to himself, at the time of the marriage, and even after, that until then the woman was a common strumpet, the unpleasantness of the predicament would not afford ground for a decree of nullity. It is difficult, therefore, to understand, that, in this case, the element of unpleasantness should have a controlling influence.

§ 189. **Continued — The Result.** — It cannot, consequently, be disguised, that the reasoning on which this case proceeded is, *when looked at in its parts*, of a somewhat unsatisfactory nature. At the same time it should be observed, that, as will appear in subsequent sections, the result accords with what may be deemed to be the judicial opinion of this country. And the writer of these volumes, while, if he were a judge, he could not probably reason the case out as well as did the learned chief justice who pronounced the opinion, cannot in these pages, more than he could were he on the bench, see a clear path to the contrary conclusion. There are, in the law, intangible lines, too subtle for the pen clearly to draw, yet obvious to the legal mind. And here, though the particular reasons, when looked at one by one, seem not substantial, yet the mind does recognize a substantial justice in the result. And it is a principle very widely extending through our law, that *combinations of things* produce an effect which each several thing, acting singly, though one should follow the other until all had thus severally acted, could not do. The law is as wise as was the man who, in the fable, taught his sons wisdom by means of a bundle of sticks. We have the doctrine of conspiracy—

but why enumerate? The learned reader will call to mind sufficient illustrations. Let us see how this combined case stands: —

§ 190. **Continued.** — A woman knows she is pregnant; she is somewhat along in years. There is a boy; and she employs other persons to assist her in stimulating the boy's mind, and to tell him the untruth that she is a virtuous woman. This and more are done, yet all is false. The reader remembers the rest. Here is a *combination of circumstances*, no one of which might perhaps, on any sound principle, be deemed sufficient; but, when all come together, the mind cries, — "Hold, this is enough!" The extent, therefore, of the fraud practised in the particular case is to be considered. This is one of the propositions which the court laid down. The kind of fraud is another matter to be considered; this is another of the learned judge's propositions. And the writer will add a third proposition; it grows out, indeed, of some words employed by the judge himself, as the reader will see, if he turns to the report: Where, on a review of the whole case, the court perceives, that to hold the marriage valid and keep the parties in cohabitation would present an unseemly spectacle to the public eye, considering the actual state of opinions in relation to marriage, this should be taken into the account. The court is, in some measure, the guardian of marriage, and it should not, therefore, send abroad the ward to receive the scoffs of right-minded people in whose presence she walks. Still another consideration is this: A judge, though he sits to administer the law of his own State, and not the law of England as such, or the law of any sister State, is still to pronounce, not what he as an individual may deem intrinsically best, but, where the line has not been drawn, and principles are conflicting or doubtful, what he believes to be the common legal sentiment. And to ascertain this, he receives help from other States and countries, as well as his own. In the present case, the court had intimations in judicial decisions of sister States. Thus the California court had a little while before decided, that, if a woman is with child by a stranger, at the time of the marriage, and her intended husband is ignorant of the fact, he may have the marriage declared null for the fraud. The statute of the

State provides for such a sentence "when the consent of either party was obtained by force or fraud."[1] The reasoning of the court, in this California case, is such as will amply repay a careful perusal, but the writer has already occupied too many sections with the topic to justify an extension of the discussion much further.

§ 190 *a*. **Continued.** — Since the case of Reynolds *v.* Reynolds, which we have been discussing in the last few sections, was decided by the Massachusetts court, the like question has been before the same tribunal under facts more or less differing from those. And it is held, that, if a man has had himself sexual intercourse with a woman, but unknown to him she has also had the like intercourse with another man, and by the other man has become pregnant, and he marries her on his faith in her assurance that the child is his, this is not a fraud which will justify the setting aside of the marriage.[2] In like manner, if he has done that from which paternity may spring, and she denies being pregnant, while in fact she is by another man, and on the faith of this denial he marries her, he cannot therefore have the marriage set aside. Said the court, in the case in which it was so adjudged: "The facts show that the libellant had full knowledge that the libellee was unchaste, before he entered into the marriage contract, and was thereby put on his guard, so that he cannot allege that he was induced to contract the marriage by such fraud and deceit on the part of the libellee as will enable him to avoid the contract."[3]

[1] Baker *v.* Baker, 13 Cal. 87, 102. See also Montgomery *v.* Montgomery, 3 Barb. Ch. 132; post, § 191.

[2] Foss *v.* Foss, 12 Allen, 26. The case was one in which the man took no steps to verify, by independent inquiries, the statement of the woman on the point whether or not she had been unchaste with another man; and the language of the learned judge who delivered the opinion is such as perhaps to leave it to be inferred, that, if he had taken such steps, and still been deceived, the result might be different. I doubt, however, whether the court would have deemed such a fact, had it existed, to alter the case. If the man had asked a thousand persons, and all had said they knew nothing against the woman's chastity, I do not see how this could have changed the relation of the contracting parties. I am rather inclined to understand the court to lay down the doctrine, that, since the man had himself found the woman frail, he was put on his guard, then, if he chose to marry her, he took the consequences.

[3] Crehore *v.* Crehore, 97 Mass. 330. I cannot but think that there is another ground upon which this decision could equally well have been put. Fornica-

§ 190 *b*. **Continued.** — But, in the facts of most cases, the woman simply conceals her pregnancy, and nothing is said on the subject. In other words, the majority of men, about to marry, do not put to the intended wife the direct question, in the presence of witnesses, — "Are you pregnant?" If, then, the woman is found to be pregnant, what is the consequence of having omitted to put the question? Another Massachusetts case holds, that, to sustain a libel for nullity on this ground, it is not necessary the woman should have made to the man any express representations. Said Bigelow, C. J.: "There must be satisfactory proof either of misrepresentation or concealment of some essential fact. This may be established either by direct or by circumstantial evidence. Nor is it necessary that it should be shown that there were any express misrepresentations or any positive and overt acts of concealment. It is sufficient to prove that the acts and conduct of one of the parties were such that a reasonably cautious and prudent person might be misled or deceived as to the existence of a particular fact which formed the basis or contributed an essential ingredient in the contract, and that these acts and conduct were adapted and designed to induce and create a false impression and belief in the mind of the other party. Every intentional misrepresentation of a material fact, however caused, whether it is the result of express statements or is to be implied from circumstances, if made with a view to induce another person to become a party to a contract which he would not else have entered into, affords sufficient ground to absolve the innocent party from the obligation which he was fraudulently led to assume. This is the general rule applicable to all contracts; and we are unable to see any reason for excepting from its operation the contract of marriage. The real difficulty in

tion is, in Massachusetts, an indictable offence. The woman's misrepresentation, therefore, related to matter about which she and the man had been jointly engaged in breaking the laws; and not the less so, though it included the false statement that she had not broken the laws with another person. It would be against the policy of the law, therefore, to sustain a suit growing out of this transaction. In a State in which fornication is not indictable, this point would not be so palpable; still, in such a State, fornication is a gross breach of the good order of society; and it might well be deemed to be against the policy of the law to relieve a plaintiff from a fraud committed by the defendant in respect of this sort of immoral act, in which the parties had mutually participated.

applying the rule to the latter contract is in determining what facts shall be deemed material. But when that question is once settled, the facts are to be shown in the same manner as other similar facts are established in regard to other contracts. If such were not the rule, it would be very difficult, if not impossible, to prove a fraud, such as is alleged in the petition in the present case. A woman who was about to enter into the marriage contract would rarely, if ever, make her condition as to pregnancy by other men the subject of express representations to the man whom she intended to marry." [1]

§ 191. **Continued.** — These Massachusetts cases, with some other recent ones, have been examined together, because they seem to have given form and consistency to the general doctrine. But the doctrine had been before maintained by other courts; and, in the earlier editions of this work, it was laid down, upon the cases which had been adjudged, as follows: If a woman, being with child, falsely tells a man (here, of course, the man knows of the fact of the pregnancy) that the child is his, and he, believing this misrepresentation, marries her; [2] or, knowing it is not his, marries her to avoid a prosecution, [3] but afterward comes in possession of the means of proving his innocence; still the marriage is good. Neither, it seems, is the case different, if she, being a white person, is pregnant of a mulatto child, and conceals from the man, also white, the fact that she received a negro's embraces about the time of receiving his. [4] Where, in the case last put, no active measures were taken by the woman to deceive, the marriage was held to be valid. [5] But where, in the circumstances thus mentioned, the child had been born, and she knew it to be a mulatto, yet swore it upon the white man, and took out a bastardy process, on which she had him arrested; to avoid which process, under the belief of being the father, he married her; the marriage was set aside as procured by fraud. "If," said the Chancellor, "the child had not been born at the time of marriage, the

[1] Donovan *v.* Donovan, 9 Allen, 140, 141.

[2] Moss *v.* Moss, 1 Ire. 55. See also Frith *v.* Frith, 18 Ga. 273.

[3] See post, § 212, 213.

[4] Scott *v.* Shufeldt, 5 Paige, 43. And see Hulings *v.* Hulings, 2 West. Law Jour. 131.

[5] Scroggins *v.* Scroggins, 3 Dev. 535.

complainant would have had some difficulty in showing that he had been intentionally deceived and defrauded by the defendant, as she might possibly have supposed the child to be his, although she had also had connection with a negro about the same time."[1] Also, it has been held (a case considered more at large in the foregoing sections), that, if a pregnant woman, representing herself to be virtuous, takes measures to conceal her pregnancy, and so induces a man to marry her, he may have the marriage set aside for her fraud. Thus the court decided, in a case so adroitly managed that the first suspicion the man had was awakened by the appearance of a full-grown babe, three weeks after his marriage; whereupon he left her, and brought his suit.[2] If a woman pretends to a man that she is pregnant by him, and she is not pregnant at all, but he marries her believing her representation to be true, he cannot have the marriage set aside for this fraud.[3]

§ 191 *a*. **Continued — Statutes — (Bestiality, in the Note).** — This form of fraud has in some of our States been legislated upon. Thus, in Alabama, a divorce may be granted "in favor of the husband, when the wife was pregnant at the time of marriage, without his knowledge or agency."[4] What may be the construction of this statute the author has no means of saying. But, upon its face, it would appear to go somewhat further than the unwritten law. Probably if a woman, though pregnant, should have no knowledge or suspicions of the fact, and should make no representations directly or indirectly on the subject, and a man should marry her not knowing her to have committed any unchaste act, this marriage would not, under the unwritten law, be set aside by the courts. Still it would seem to be a case within this Alabama statute. In like manner, the Georgia statute, which would appear to require the same construction, mentions, among the causes of divorce, "pregnancy of the wife, at the time of marriage, unknown to the husband."[5]

[1] Scott *v.* Shufeldt, supra.

[2] Morris *v.* Morris, Wright, 630; s. P. under a statute authorizing divorces in the discretion of the court, Ritter *v.* Ritter, 5 Blackf. 81.

[3] Hoffman *v.* Hoffman, 6 Casey, 417.

[4] Rev. Code of 1867, § 2352.

[5] Code of 1868, § 1711. Of course, these statutes, like all others, must be construed to harmonize with the unwritten law, except in particulars upon which they are distinct. Thus, in

§ 192. **Forged Marriage License.** — To proceed now to other forms of fraud, a Texas case goes to the very great length, that, where a girl fifteen years and seven months old had, without the consent of her parents, permitted herself to pass through the form of matrimony with a man who produced a license which he had procured by forgery, and she had never yielded to the consummation of the marriage, it might be set aside, on her application, for his fraud. The doctrine was even laid down, that this was so, whether, in matter of law, a certificate or any regular solemnization is essential or not to constitute marriage.[1] But here, the reader observes, we have the element of non-consummation, already discussed;[2] also the element, about to be considered, of the immaturity of the mind operated upon.

§ 193. **Fraud practised on Weak, Disordered, or Subject Mind.** — One of the most material considerations involved in these cases relates to the quality of the mind upon which the fraudulent representations are made to operate. In fact, the blending of the two causes of nullity, weak mental capacity and fraud, is, as was observed in the chapter on insanity,[3] very commonly found in the facts of the cases. Let us see how this question stands in relation to contracts not matrimonial. In a Tennessee case, where suit was brought in equity to have some promissory notes set aside on the ground of the want of mental capacity in the party executing them, and of fraudulent practices by the other party, McKinny, J., observed: "The proof shows, that he [the maker of the notes] was greatly harassed and distressed in mind; that he was pressed most importunately by the defendant and others to execute the notes; that his fears were appealed to by threats of a lawsuit, which might sacrifice his estate; that false representations were made to him respecting his supposed liability to the

Alabama, among the causes of divorce is "the commission of the crime against nature, whether with mankind or beast, either before or after marriage." Rev. Code of 1867, § 2351, 4 *a*. This provision is silent concerning the knowledge of the complaining party. But clearly, if the offence was committed before marriage, and the complaining woman knew of it at the time when her nuptials were solemnized, she could have no relief. Here the common law would supply that about which the statute was silent. Bishop Stat. Crimes, § 114, 119, 124, 144, 1021, 1022.

[1] Robertson *v.* Cole, 12 Texas, 356.

[2] Ante, § 166, 169–172.

[3] Ante, § 134, 135.

defendant; and that his wife at length, in the hope of relieving his mind, joined in urging him to assent to the terms dictated by the plaintiff; and that, under the various influences, he was induced to make himself liable for the payment of $530 to the defendant, and to execute his obligations for the same, wholly unsupported, in our opinion, by any consideration, legal or moral." There was, in short, a combination of weakness, on the one side, and of fraudulent practices and undue influence, on the other; and the party was, therefore, relieved by the court from his obligation.[1] And this general doctrine is illustrated in a variety of cases.[2] If the one imposed upon stands in a relation of confidence to the person using the imposition, — as if he is nearly related, or the other has great influence over him, — this renders the court still more ready to set aside the contract.[3]

§ 194. **Continued.** — Where the contract is an executed one, — as, for instance, where there is a conveyance of land and possession is taken under it, — the court will not so readily set it aside as when it is merely executory; a point which, the reader perceives, has its application in marriage, which, when viewed as a contract, is, not executory, but executed.[4] Said Woodward, J., sitting in the Pennsylvania court: "Nothing but fraud or palpable mistake is ground for rescinding an executed conveyance. So long as the contract continues executory, it may not only be impeached for fraud or mistake, but any invalidity which would be a defence at law would in general be ground for cancellation in equity."[5] Yet executed contracts are sometimes set aside in ordinary matters as well as in matrimonial.[6] And in all these cases it must appear, not only that the party was liable to be influenced by fraudulent practices, but also that he was actually defrauded.[7] A point

[1] Johnson *v.* Chadwell, 8 Humph. 145, 149.

[2] Marshall *v.* Billingsly, 7 Ind. 250; Stewart *v.* Hubbard, 3 Jones Eq. 186; Tracey *v.* Sacket, 1 Ohio State, 54; Craddock *v.* Cabiness, 1 Swan, Tenn. 474; Chevalier *v.* Whatley, 12 La. An. 651.

[3] Graham *v.* Little, 3 Jones Eq. 152; Powell *v.* Cobb, 3 Jones Eq. 456; Taylor *v.* Taylor, 8 How. U. S. 183; Freeland *v.* Eldridge, 19 Misso. 325.

[4] Ante, § 3.

[5] Nace *v.* Boyer, 6 Casey, 99, 110.

[6] Ellis *v.* Mathews, 19 Texas, 390; Powell *v.* Cobb, 3 Jones Eq. 456; James *v.* Langdon, 7 B. Monr. 193.

[7] Walton *v.* Northington, 5 Sneed, 282; Nace *v.* Boyer, supra.

like this, as applied to marriage, was discussed in a previous chapter.[1]

§ 195. **Continued.** — So, in a matrimonial case, which was a mixed case of fraud and mental imbecility, Sir John Nicholl observed: "Nor am I prepared to doubt but that considerable weakness of mind, circumvented by proportionate fraud, will vitiate the fact of marriage, whether the fraud is practised on his ward by a party who stands in the relation of guardian, as in the case of Harford *v.* Morris, which was decided principally on the ground of fraud,[2] or whether it is effected by a trustee," which was the case before the court, "procuring the solemnization of the marriage of his own daughter with a person of very weak mind, over whom he has acquired a great ascendency. A person incapable from weakness of detecting the fraud, and of resisting the ascendency practised in obtaining his consent to the contract, can hardly be considered as binding himself in point of law by such an act." And therefore the pretended marriage was in this case ultimately set aside.[3]

§ 196. **Continued.** — Wakefield's Case, otherwise termed Miss Turner's nullity of marriage bill, turned chiefly on fraud and conspiracy, though partaking slightly of the element of duress. There a girl of fifteen, having large expectations of fortune, was inveigled away from her boarding-school on the false representation that her mother, being attacked with dangerous sickness, had sent for her. The conspirators, having obtained thus the control of her person, induced her to marry one of them, by a series of fraudulent representations, the chief of which were, that her father had become bankrupt, was flying from his house in great distress to evade the pursuing bailiffs, and the only mode of escape for him was in her marrying the conspirator, and thereby obtaining, in a manner pointed out to her, power over the estates. A pretended message from her father was also communicated to hasten her decision. After the marriage, and before consummation, she was traced out and rescued by her friends. "Why did you consent?"

[1] Ante, § 135.

[2] Harford *v.* Morris, 2 Hag. Con. 423, 4 Eng. Ec. 575. Sir W. Wynne said this case was decided "on the ground of force and custody." See note at the end of the report.

[3] Portsmouth *v.* Portsmouth, 1 Hag. Ec. 355, 3 Eng. Ec. 154, 156.

she was asked, while testifying in a criminal prosecution against the conspirators. From "the fear that, if I did not, my papa would be ruined." The conspirators were convicted in the criminal court; and the marriage was declared void by act of Parliament, to which it was said her friends resorted merely in consequence of the rule of law which would have rendered her testimony inadmissible in the ecclesiastical tribunal.[1]

§ 197. **General Survey — Facts viewed in Combination.** — The foregoing views, consisting of a combination of legal principles and specific facts, do not by any means exhaust the subject; neither are there cases in sufficient number to enable any writer to do this. At the same time we seem to have arrived fairly at the conclusion, that in this particular matter of fraud, we are, in the nature of things, to walk more in the light of particular cases, and less in the light of any general principles deducible from them, than in many other departments of our law.[2] Looking, therefore, after the facts of individual cases, let us make an exploration into the field of Scotch law.

§ 198. *Scotch Law of Fraud:* —

The following is what Mr. Fraser has on the subject, with his citations of authorities: —

[1] Rex *v.* Wakefield, 69 Annual Register, 316, 47 Edin. Rev. 100, 2 Lewin, 279, 2 Townsend St. Tr. 112, 1 Deac. Crim. Law, 4; Turner's Nullity of Marriage Bill, 17 Hans. Parl. Deb. N. S. 1133; Shelford Mar. & Div. 215; 1 Fras. Dom. Rel. 234. The reason stated in the text for applying to Parliament is the one assigned by Mr. Peele, as shown in the place above cited from the Parliamentary Debates, together with the further reason of the delay of perhaps three years attendant upon a proceeding in the Ecclesiastical Court. Mr. Peele considered, that the facts, if proved before an English court, would be sufficient to authorize a sentence of nullity; but the Scotch lawyer who was examined on the trial of the criminal case — this being a Gretna Green marriage between English parties — was of the opinion, which appears to have been erroneous, post, § 198, that, by the law of Scotland, a marriage could not be set aside for any fraud not involving "a mistake in the identity of the person." 2 Townsend St. Tr. 150. The writer in the Edinburgh Review above cited, after making many well-considered observations upon the subject of fraud as invalidating the marriage contract, concludes his review of this case thus: "Upon the whole, therefore, though there are many difficulties in the question, we incline to think that the marriage would not have been set aside in any court, either of England or Scotland." p. 107. But see contra, Irving Civ. Law, 102, note. For some analogous cases, see Townsend's State Trials, as above cited. See also Field's Marriage Annulling Bill, 2 H. L. Cas. 48; Hull *v.* Hull, 15 Jur. 710, 5 Eng. L. & Eq. 589.

[2] Ante, § 183, 189, 190.

General Doctrine — Fraud and Force compared. — "Fraud, in the constitution of the contract of marriage, renders it void. Force implies *physical* constraint of the will; fraud, some overruling *moral* necessity, whereby a certain state of the will is brought about, which would not have so been without deceit. In both cases the result is the same, although the constraint employed operates differently.[1] And as to both, morality and law visit the deed with the same condemnation. It is the law of Scotland, that a marriage brought about by false and fraudulent representations is null. This doctrine was denied by Mr. M'Neill at the trial of the Wakefields; but it will be found to be sanctioned by various judgments of the court.

§ 199. **General Views — Cameron *v.* Malcolm.** — "No attempt will here be made to define what shall amount to fraud sufficient to set aside the marriage, as no two cases on this subject are alike. Lord Stair terms fraud *hydra multorum capitum*. In Cameron *v.* Malcolm,[2] a young lady, aged twelve years and six months, the daughter of a proprietor in Fife, had gone through a form of marriage with John Cameron, a young man of twenty-two, the son of a neighboring proprietor. It appeared that the girl had a considerable fortune which Cameron wished to secure, his own father being in laboring circumstances; and accordingly he made proposals of marriage to her mother, who put the matter off by urging the youth of her daughter; recommended him to go abroad for some time, and on his return stated that she had no doubt the marriage would be agreed to. The parties, some time after this, agreed to come over from Fife to Edinburgh, and this they did together; but not a word was said of marriage, or of an intention to enter into that contract. On arriving at Leith, Mrs. Malcolm, the girl's mother, sent up her servant-maid and a boy to Edinburgh, to put on fires, and prepare every thing for her reception; but she proposed to keep the governess to go up in the coach with herself and daughter. But, as the elder Cameron, his wife, and son, had determined to get the marriage celebrated that night, they foresaw that the presence of the gov-

[1] *Voluntati vim infert, qui fraude persuadet,* says Brower.

[2] Cameron *v.* Malcolm, Mor. 12586 (1756). This statement of the case brings out the fraud which existed. It has been taken from the Session-papers, as that in the dictionary makes it seem entirely a mere squabble.

erness in the coach would balk the scheme; Mrs. Cameron accordingly objected to her presence, and she was accordingly sent off with the other two servants. The company were then brought to the house of Mrs. Cameron's mother, where they drank tea; and, after tea, Mrs. Malcolm and her daughter stayed, on Mr. Cameron's suggestion, to supper, the excuse being that their own house would not yet be ready to receive them. Immediately after supper, young Cameron went for the Episcopal minister to marry them; there was no proclamation of banns. From some unexplained reason, the mother of the young woman then left the room. The parties shortly after came to the room where her mother and his father were sitting, when young Cameron said that the girl had consented to marry him, a proceeding to which the mother would not agree. The minister deponed, that the mother said that she gave her consent freely. But she immediately left the room, and would not be present at the ceremony. Thereupon the two parties were married, both of them audibly repeating the words of the office as they were directed. But the confusion and terror of the young woman were such, that, after she had repeated the responses as directed by the service, when the minister proceeded to read the prayers she repeated them also, until the minister stopped her. The marriage being over, a bedding was proposed. But the mother now came in, objected to this, and immediately carried off her daughter, in spite of the remonstrances of the Camerons.

§ 200. **Cameron** *v.* **Malcolm, continued.** — "The court were all of opinion, with the exception of one judge, that there was no marriage, as the whole proceeding was a fraudulent, deceitful scheme to entrap a young girl into a marriage, who, though apparently consenting to it, did not know what she was doing. The opinions of the court are stated in detail on the Arniston Session-papers.

§ 201. **Niven's Case — Allan** *v.* **Young.** — "Another case is stated by Lord Fountainhall,[1] thus: 'One Niven, a musician in Inverness, is pursued for deceiving one of his scholars, a lass of twelve years old, called Cumming, a minister's daughter, and marrying her, and getting a country minister to do it, by

[1] Reported also at p. 8935, Morrison's Note.

suborning one to call himself her brother, and to assert to the minister that he consented. This being an abominable imposture, and theft, and a perfidious treachery, having a complication of many villanies in it, he was sentenced, for an example, to stand at the pillory with his ear nailed to the Tron, then to be banished, which was done.' This was a decision of the Privy Council, and not of the Court of Session. The same doctrine was further confirmed by the case of Allan *v.* Young,[1] which was the case of a declarator of marriage by a schoolmaster against a young woman. While a pupil of his, and only thirteen years of age, she had, by presents and flattery, been enticed to his house, where he succeeded in getting a clergyman to perform the marriage ceremony, there being no previous proclamation of banns, though a certificate thereof had been purchased by the pursuer. The clergyman proved, that he had taken her into another room, before the ceremony, and satisfied himself that she understood the nature of the duties and engagements she was about to undertake, and had deliberately resolved to marry the pursuer; and that, at the ceremony, she made her responses firmly and clearly. The girl's mother, after the ceremony, seemed at first to acquiesce, but in the evening rescued her, and carried her off. The commissaries dismissed the action, and the Court of Session confirmed the sentence.

§ 202. **Observations on the Cases — Youth — Mature Age.** — "These were all cases where the fraud was practised upon parties who were certainly capable of marriage, but who, from their youth, were peculiarly liable to be deceived. There are, however, cases where, with regard to persons of mature age, fraud in obtaining the consent to the contract has been held sufficient to annul the pretended marriage. The cases in which this has been sustained are of this nature: The woman generally gets the man into some retired place, for the purpose of carnal connection, and there, before this is allowed to proceed, she obtains from him a promise of marriage, and copula immediately follows. She has, at the same time, two or three witnesses stationed so as to hear the promise, but concealed

[1] Allan *v.* Young, 9 Dec. 1773, Ferg. Rep. p. 37. See English cases to the same effect in Shelford Mar. & Div. 134, 187, 214.

from the man. The consent here has been obtained *in æstu amoris*, without any intention on his part, she well knowing it, of entering into marriage, and where, if he had known that there were witnesses to the transaction, he would not have made the promise. The marriage, therefore, being brought about by the fraudulent contrivance of the woman, the court have refused, in such cases, to sustain it.[1]

§ 203. **Further Views — Mistake as to the Person, &c.** — "The law was laid down by Lord Stair, as applicable to marriage, before he had decisions of the court to guide him. 'If,' he says, 'any one married Sempronia, supposing her to be a virgin, rich or well natured, which were the inductives to his consent, though he be mistaken therein, seeing it is not in the substantials, the contract is valid. But if the error or mistake, which gave the cause to the contract, were by the *machination, project, or endeavor* of any other party than the party errant, it would be circumvention.'[2] And Mr. Fergusson says, that, 'when it can be fully established by evidence that the apparent consent by either is not of the quality requisite, but has been extorted or gained by force, or *fraud*, so as not to be free and genuine, the contract, on this ground, although as to form completed by parties both legally capable, may likewise be set aside, as void *ab initio*, by regular and timely challenge, at the instance of the party thus unlawfully compelled or deluded.'[3] 'Fraud,' says Pothier, 'is no less contrary to freedom of consent, required for marriage, than is violence: a consent impetrated by fraud and deceit (*seduction*) is as imperfect as that obtained by violence.'"[4]

§ 204. *Further of our own Law:* —

Mistake as to the Person — Assumed Name. — So much for the law of Scotland. To return to our own law: if a person of bad character, to enter into a marriage, assumes the name of a person of good character, and the other party does not therefore marry the individual he intends, the marriage is a

[1] Barr *v.* Fairie, 12 Feb. 1766. See it in Sess. Papers, Arniston Collection, vol. lxxvii. and shortly noticed, 5 Sup. 921. Harvey *v.* Inglis, 19 Feb. 1839.

[2] Stair, 1, 9, 9, & 1, 10, 13, 3d paragraph; Ersk. 3, 1, 16.

[3] Ferg. Consist. Law, p. 107.

[4] Pothier Tr. Cont. Marriage, § 220; 1 Fras. Dom. Rel. 234–237.

nullity.[1] But if he marries the one he intends, it is good, though such one passes under an assumed name.[2] In the latter instance there is consent to take the individual with whom the ceremony is performed; in the former there is not such consent. But perhaps this doctrine, while it seems to be correct in principle and to be sustained by authority, is a little shaken by a case which occurred in the early part of the eighteenth century. It is the case of Robert Feilding, otherwise called Beau Feilding, who was indicted for polygamy in marrying the Duchess of Cleveland, having alive another wife, whose name before her marriage to him was Mary Wadsworth. The facts of his first marriage were, that he wished to obtain the hand of a certain rich widow whom he had never seen, and that this Mary Wadsworth was passed off upon him as being the widow he meant to marry, whereupon he courted her with great violence of passion, married her, then lost his love on finding out the trick. No attempt was made on his trial to show that, in point of law, the marriage was in any way made invalid by the deception practised upon him; he was convicted by the jury, and escaped death by pleading the benefit of clergy. Afterward (which is the more important fact in point of legal authority), the Duchess of Cleveland obtained in the ecclesiastical court a sentence of the nullity of her marriage with him, by reason of this pre-existing marriage.[3] The reader will however observe, that, assuming the law of this case to be correct, still Mr. Feilding did in fact marry the same woman whom he courted, getting possession of the same flesh and bones he professed to love, though she turned out not to be the particular rich widow he supposed she was.

§ 205. **Continued — Doctrine of Fraud restated — Ignorance of Law.** — The impetuous mind of Lord Brougham once led him to utter, in the Court of Delegates, the following dictum: "It should seem indeed to be the general law of all countries, as it certainly is of England, that, unless there be some positive provision of statute law, requiring certain things to be done in

[1] Rex *v.* Burton-upon-Trent, 3 M. & S. 537; Lord Stowell, in Heffer *v.* Heffer, 3 M. & S. 265.

[2] Clowes *v.* Clowes, 3 Curt. Ec. 185, 191.

[3] Feilding's Case, Burke's Celebrated Trials connected with the Aristocracy, 63, 78, which is the only report of the case before me.

a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of imposition which can avail to set aside a contract of marriage knowingly made."[1] Thus we have, from this distinguished person, words which set at naught all that has been said in the foregoing sections of this chapter, except the last section. Let us, however, cleave to what of this dictum is sound law; while the remainder of it reminds us, that to err is human. If the writer does not err, it is also true, that, in all cases where the party entering into the form of marriage gives no real consent, because the will is overpowered by the arts of cunning, or the force of menace, or by any other means, the marriage remains a nullity until, as it sometimes happens, the will in a disenthralled condition affirms the marriage. Therefore it has been held, that, if one knowing the law entrap another ignorant of it into a ceremony valid in form, before a magistrate or minister of the gospel, under the representation of its not being binding, which representation is believed; and, if the party deceived does not intend it shall be followed by cohabitation without a further public ceremony, and it is not so followed; the marriage is void. And the remark has been made that there may be extraordinary cases in which such a marriage would be invalid after consummation.[2]

II. *Error.*

§ 206. **Doctrine stated.** — Thus we have been led, in tracing the law of fraud in marriage, to the consideration also, in the last three sections, of the subject of error; for, though the cases mentioned in those sections are properly enough considered under the title of fraud, they embrace also the element of error. If we look at this question of error in the light of principle, we shall come to the following conclusion: Inasmuch

[1] Swift *v.* Kelly, 3 Knapp, 257, 293.

[2] Clark *v.* Field, 13 Vt. 460. See also Robertson *v.* Cowdry, 2 West. Law Jour. 191, 1 S. W. Law Jour. 167; Mount Holly *v.* Andover, 11 Vt. 226; post, § 245.

as there must be a consent in order to constitute marriage, if there is such a mistake, in one or both of the parties, that the formal consent given does not apply to the person with whom the formal marriage is celebrated, then the marriage is a mere nullity; but, if it does apply, then the marriage is good unless fraud has entered into the matter of mistake, in such a way as to render it invalid on this ground.

§ 207. **Substitution of one Person for another.** — An illustration of mistake, or error, is where one person is substituted for another. "This," remarks Chancellor Kent, "would be a palpable fraud;" and he adds, that "it would be difficult to state a case in which error simply, and without any other ingredient, as to the parties or one of them in respect to the other, would vitiate the contract."[1] Still, though it may be difficult to imagine how a person intending to marry A could, without a fraud being practised upon him, marry B, yet, if the fact were established, there is no doubt the marriage would be held invalid.[2] And Lord Campbell puts the case of marriages in masquerade, where the parties are entirely mistaken as to the persons with whom they are united, as clearly void.[3]

§ 208. **Views of the Canonists.** — The canonists, according to Ayliffe, reckon four species of error. First, *error personæ;* as when I have thought to marry Ursula, but, by mistake of the person, I have married Isabella. An error of this kind renders the marriage void; "for deceit is oftentimes wont to intervene in this case, which ought not to be of any advantage to the person deceiving another."[4] Secondly, error of *condition;* as, when I think to marry a free-woman, but through mistake marry a bond-woman. This will avoid the marriage. But if the condition of the party were known, "the church did not dissolve such a marriage." Thirdly, error of *fortune;* which does not invalidate the marriage. Fourthly, error of *quality;* as, where a man marries a woman believing her to be a chaste virgin, or of a noble family, or the like, but finds her to be deflowered and of mean parentage. This kind of error

[1] 2 Kent Com. 77. And see the cases of fraud in the name of the person, ante, § 204, 205.

[2] Stayte *v.* Farquharson, 3 Add. Ec. 282; ante, § 204, 205.

[3] In Reg. *v.* Millis, 10 Cl. & F. 534, 785.

[4] See ante, § 204, 205.

does not affect the validity of the marriage. "Nay," adds our author, "the canonists are so far from rescinding a marriage contracted with a strumpet, that the law makes it a matter of merit for a man to take an harlot out of the stews and marry her; because it is not the least act of charity, says the canon law, to recall a person going astray, from the error of her ways; but the true reason is, because the law allows of public stews." [1]

§ 209. **Further Suggestions — False Representations through Mistake — Caution — Injury suffered.** — It may be well for the reader, who is investigating this subject, to look through those cases in which courts of equity set aside contracts other than matrimonial for mistake, — that is, for error, — and those cases in which courts of law hold a like doctrine where there is an attempt to enforce the contract. Thus, a vendor, who makes a positive representation about the property, — a case truly of error, if he believes the representation he makes, — is said to be guilty of fraud, equally whether he speaks in ignorance of the facts, or whether he wilfully deceives.[2] Yet this doctrine has its limits.[3] And — here we come again into pure fraud — the misrepresentation, or the error of fact, must be about a thing which is material, and must be one upon which the party entering into the contract really relied; as also, supposing there to be no weakness of mind, the party deceived must have used reasonable caution; and he must have suffered an injury.[4]

III. *Duress.*

§ 210. **General Doctrine.** — Where a consent in form is brought about by force, menace, or duress, — a yielding of the lips, but not of the mind, — it is of no legal effect. This rule, applicable to all contracts, finds no exception in marriage.[5]

[1] Ayl. Parer. 362, 363; ante, § 179.

[2] Miner *v.* Medbury, 6 Wis. 295. And see Gale *v.* Gale, 19 Barb. 249; Story *v.* Norwich & Worcester Railroad, 24 Conn. 94.

[3] Gatling *v.* Newell, 9 Ind. 572; Payne *v.* Smith, 20 Ga. 654.

[4] Swift *v.* Fitzhugh, 9 Port. 39; Bigby *v.* Powell, 25 Ga. 244; Collier *v.* Harkness, 26 Ga. 362; Peter *v.* Wright, 6 Ind. 183; Hill *v.* Bush, 19 Ark. 522; Davidson *v.* Moss, 5 How. Missis. 673, 687; Moss *v.* Davidson, 1 Sm. & M. 112, 144; People *v.* Cook, 4 Selden, 67.

[5] Ante, § 116, 205; 1 Woodd. Lect. 253; No. 39 Am. Jurist, 29; Shelford Mar. & Div. 213.

Neither apparently do the legal principles governing the question of duress operate differently, in their application to marriage, from what they do in their application to other contracts generally.[1]

§ 211. **Quality of the Mind acted on — Degree of the Force.** — Let us, however, consider the matter of duress in its special relation to marriage. The observation has been made, that, in order to avoid a marriage yielded to through fear, the fear must be such as may happen to a man or woman of good courage and resolution, and such as imports danger either of death or of bodily harm.[2] But probably the better view is, that this question is one of evidence: that, since matrimony must be contracted with full and free consent, if a woman void of courage and resolution is in such a state of mental terror as not to know what she is about,[3] while another more heroic would have remained undaunted, still, there is the same want of consent, and the marriage is as completely invalidated as though she had possessed a firmer courage, overawed by a more imminent danger.[4] And the cases most likely to arise are where a woman of weak and irresolute mind, or a young and timid girl possessed of a fortune to be secured, is entrapped and impelled into a marriage by a degree of fraud and force utterly inadequate to overcome a person "of good courage and resolution." Such was the leading case of Harford *v.* Morris, decided on the double ground of fraud and duress; where one of the guardians of a young school-girl, having great influence and authority over her, took her to the continent, hurried her there from place to place, and married her substantially against her will. The marriage was held to be void.[5] The case, already cited,[6] of Wakefield, who married Miss Turner, was also thought to contain some of the ingredients of force, and it is in point.[7]

[1] Rnth. Inst. b. 1, c. xv. For the general principles of the law of duress, see Chitty on Contracts, 206–209; Story on Contracts, § 87–98; No. 39 Am. Jurist, 23–29.

[2] Ayl. Parer. 362.

[3] Fulwood's Case, Cro. Car. 482, 488, 493.

[4] And see ante, § 195.

[5] Harford *v.* Morris, 2 Hag. Con. 423, 4 Eng. Ec. 575, and see note at the end of the case.

[6] Ante, § 196.

[7] See the act of Parliament annulling the marriage, Shelford Mar. & Div. 215, note. See also Portsmouth *v.* Portsmouth, 1 Hag. Ec. 355, 3 Eng. Ec. 154, which was a case of fraud and

§ 212. **Marriage while under Arrest.** — If a man, arrested on a bastardy process as the putative father of a child of which the woman procuring the arrest is pregnant, marries her;[1] even though, being unable to procure bail, he does it purely to avoid being imprisoned, and compelled to contest the charges he has made oath to; he cannot afterward, on learning he could have made a successful defence, have the marriage set aside as procured by duress.[2] Perhaps the result would be otherwise, if the arrest were under a void process; and a doubt may be entertained, whether it would not be, if shown to be both malicious and without probable cause.[3]

§ 213. **Continued.** — The author has been favored with a case, decided by one of the judges of the Supreme Judicial Court of Massachusetts, wherein the doctrines of the last section seem to be fully sustained. As reported by H. J. Fuller, Esq., counsel for the libellant, it is as follows: —

"*Libel to annul a Marriage alleged to have been procured by Fraud and Duress.* — Abram A. James *v.* Julia B. Smith. The parties were respectively paupers of the towns of West Bridgewater and Raynham. The libellant alleged in his libel, that he was unlawfully arrested by a deputy sheriff for the county of Plymouth, at the instance of two of the selectmen of Raynham, and taken to the office of George W. Bryant, Esq., a magistrate within and for the county of Plymouth, and from thence to the house of said Julia B., where the marriage ceremony was performed by said Bryant,— that at the time of his arrest the officer had no warrant or precept whatever, nor during the time he was in the official custody,— that the selectmen aforesaid threatened to shut him in jail, to imprison and deprive him of his liberty, if he refused to marry said Julia B., or pay to them the sum of five hundred dollars, all of which threats were made during the time he was held in close custody by said selectmen and deputy sheriff,— that being unable to pay said sum of money, and through fear of being

lunacy in combination. And see ante, § 175.

[1] Jackson *v.* Winne, 7 Wend. 47; Williams *v.* The State, 44 Ala. 24.

[2] Scott *v.* Shufeldt, 5 Paige, 43.

[3] See Reg. *v.* Orgill, 9 Car. & P. 80; Story Cont. § 88, 89; No. 39 Am. Jurist, 23, 24; Soule *v.* Bonney, 37 Maine, 128; Barton *v.* Morris, 15 Ohio, 408; Collins *v.* Collins, 2 Brewster, 515.

deprived of his liberty, and while surrounded by said deputy sheriff and his associates, he consented to marry said Julia B., and under these circumstances and while still continuing in the custody of the said deputy sheriff and his associates, the marriage ceremony was performed, — that immediately after the said ceremony he left the said Julia B., and never at any time after had connection with her.

"The cause of making the arrest was, that the said Julia B. had, some weeks previously, been delivered of a bastard child, which she alleged and swore at the trial to be the child of the libellant, though she had never made any complaint before a magistrate, nor had any warrant ever issued according to law. The libellant denied that he was the father of the child.

"The case was tried before Judge Dewey. The facts as they appeared in the evidence were substantially those alleged in the libel. The decree of the court was as follows: —

Form of Decree of Nullity. — "Plymouth ss. May Term, 1861, Supreme Judicial Court. In the matter of Abram A. James *v.* Julia B. Smith, praying for a decree of this court that a certain marriage solemnized between the said parties may be declared void by a sentence of divorce or nullity, by reason of the same having been procured by fraud and duress: and upon the hearing of the evidence relating thereto the court find, that the same was obtained by duress and illegal restraint; this court does order and decree, that the said pretended marriage between the said parties be declared void and of no effect, and the same is hereby annulled to all intents and purposes."[1]

IV. *Some Principles common to the Three Impediments.*

§ 214. **Who take Advantage of the Wrong — Waiving it — Non-consummation.** — There are various principles applicable alike to fraud, error, and duress. Thus we may presume, that the party guilty of the wrong would not be permitted so far to take advantage of it, as to maintain a suit of nullity solely on that ground.[2] The other party may, if he chooses, waive his objection, and thereby render the marriage good. Therefore a voluntary cohabitation, after knowledge of the fraud or error, or after the cause of fear is removed, will cure the defect.[3] The cases are not distinct as to the circumstances under

[1] James *v.* Smith, Supreme Judicial Court of Mass., May Term, 1861.

[2] See The State *v.* Murphy, 6 Ala. 765.

[3] Ayl. Parer. 361; Scott *v.* Shufeldt, 5 Paige, 43; 1 Fras. Dom. Rel. 229; 1 Burge Col. & For. Laws, 137; Hampstead *v.* Plaistow, 49 N. H. 84, 98.

which, in fraudulent marriages, cohabitation with knowledge of the fraud will bar the right to have the marriage set aside; but doubtless the matter must be referred to general principles of law relating to such questions, as applied in other cases as well as in these.[1] We may observe, that the fact of the marriage not having been consummated has in many instances powerfully influenced the court in favor of setting it aside. When the parties are equally in the wrong, the court, plainly, will lend its aid to neither.[2]

§ 215. **Void or Voidable.** — In a certain aspect, therefore, the marriages considered in this chapter are voidable, rather than void; though generally they are spoken of as void. They are good at the election of the injured party, who on being set free from the influence of the fraud, error, or duress, may then give a voluntary consent; and the other party cannot interpose the objection of his own wrong, and say that the consent was not mutual. And Rogers has treated of these marriages under the head of voidable.[3] But until such innocent party has consented, the transaction is incomplete, and the ceremony is to be regarded as a mere nullity. This view is sustained as well by the authorities[4] as by reason. But on this question of void or voidable, in respect to such marriages, the reader is particularly referred to earlier sections of the present volume.[5]

[1] See Scott *v.* Shufeldt, supra; Clark *v.* Field, 13 Vt. 460; Morris *v.* Morris, Wright, 630; Miller's Appeal, 6 Casey, 478; Gilmer *v.* Ware, 19 Ala. 252; Gutzwiller *v.* Lackman, 23 Misso. 168; Galloway *v.* Holmes, 1 Doug. Mich. 330; Thompson *v.* Lee, 31 Ala. 292.

[2] Westfall *v.* Jones, 23 Barb. 9; White *v.* Crew, 16 Ga. 416; Miller *v.* Marckle, 21 Ill. 152; Pinckston *v.* Brown, 3 Jones Eq. 494.

[3] Rogers Ec. Law, 2d ed. 643.

[4] Respublica *v.* Hevice, 3 Wheeler Crim. Cas. 505, 507; Tarry *v.* Browne, 1 Sid. 64; Fulwood's Case, Cro. Car. 482, 488, 493; Shelford Mar. & Div. 212, note; 2 Kent Com. 76; 1 Burge Col. & For. Laws, 137.

[5] Ante, § 94–96, 105 et seq., 136–142, 153.

CHAPTER XII.

IMPERFECT CONSENT TO A MARRIAGE OTHERWISE GOOD.

§ 216. **Scope of the Chapter.** — We shall assume, through the pages of this chapter, that the parties are capable in law of intermarrying, and that there is no want of observance of forms, also that there is no mental incapacity, and no pressure, such as of fraud, duress, or the like, upon the will, — then the inquiry will be, whether or not there has been such a consent in fact as is essential to the constitution of marriage. At the same time, as the form and the substance are necessarily somewhat combined, we shall discuss the question of form, if such it may be called, in its application to marriages in those localities where there is no statutory or other like provision rendering specific ceremonies essential.

§ 217. **How the Chapter divided.** — The order of the discussion will be as follows: I. The Consent essential to Marriage; II. The Consent how given in the Absence of a Specific Requirement of Law; III. Consent in Form but not in Fact; IV. Further Views of the Consent *per Verba de Præsenti;* V. Consent *per Verba de Futuro cum Copula;* VI. Consent by Habit and Repute; VII. Effect of this Impediment of Imperfect Consent.

I. *The Consent essential to Marriage.*

§ 218. **General Doctrine.** — We have seen, that the law compels no one to assume the matrimonial status.[1] Therefore

[1] Ante, § 12, 93, 94.

every marriage requires for its constitution a consent of the parties. The consent must be mutual; for, as there cannot be a husband without a wife, one of them cannot be married without the other.[1] This mutual consent is in fact a contract, differing not essentially from other contracts.[2] It is that circumstance without which the status of marriage is never superinduced upon the parties. And by the law of nature,[3] by the canon law prior to the Council of Trent,[4] perhaps by the law of England as it stood before the passage of the first marriage act,[5] by the law of Scotland,[6] and by the laws of several of the United States, nothing need be added to this simple consent to constitute perfect marriage.

§ 219. **Continued — Statutory Formalities added.** — Even where a statute requires the marriage to be attended with specified formalities, in order to its validity, this mutual consent of the parties is no less essential. The forms are not a substitute for it. They are but methods of declaring and substantiating it; having reference to the matter of publicity, or evidence.[7] If they are gone through with, without the added consent, the marriage is a nullity, as regards both the parties and third persons.[8]

§ 220. **Continued — Illustrations from the Scotch Law — Why.** — The earlier chapters of the present book furnish illustrations of marriage invalid, though prescribed forms have been complied with, by reason of insanity, fraud, and the like; but, where no specific forms enter into the question as a sort of estoppel to parties denying their consent,[9] the doctrine (which is the matter chiefly to be considered in the present chapter)

[1] 1 Fras. Dom. Rel. 149, 184, 187, 212; 2 Burn Ec. Law, Phillim. ed. 434; Ayl. Parer. 361; True *v.* Ranney, 1 Fost. N. H. 52.

[2] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 4 Eng. Ec. 485, 508; Shelford Mar. & Div. 6; Ferlat *v.* Gojon, Hopkins, 478, 493.

[3] Lindo *v.* Belisario, 1 Hag. Con. 216, 4 Eng. Ec. 367, 374; Dumaresly *v.* Fishly, 3 A. K. Mar. 368; 2 Kent Com. 86.

[4] Dalrymple *v.* Dalrymple, supra; Reg. *v.* Millis, 10 Cl. & F. 534; Hallett *v.* Collins, 10 How. U. S. 174; Patton *v.* Philadelphia, 1 La. An. 98; Succession of Prevost, 4 La. An. 247, 349.

[5] Commonly called Lord Hardwicke's Act, 26 Geo. 2, c. 33, A. D. 1753.

[6] Dalrymple *v.* Dalrymple, supra; 1 Fras. Dom. Rel. 124; Wright *v.* Wright, 15 Scotch Sess. Cas. 767.

[7] Shelford Mar. & Div. 5, 6.

[8] Mount Holly *v.* Andover, 11 Vt. 226; Ferlat *v.* Gojon, supra; Respublica *v.* Hevice, 3 Wheeler Crim. Cas. 505.

[9] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 4 Eng. Ec. 485, 509.

is very barren of illustrations in the English and American books. The reason of this barrenness is, that marriages in England are not now valid except when the forms are added, that the same is true also in a part of the States of this Union, and that everywhere in this country the forms are so common as to cause marriages without them to be exceedingly rare. We shall be obliged, therefore, in the discussion of the present chapter, to draw our learning mainly from the fountains of Scotch law. In Scotland, informal marriages have always been common; and in them the question of consent is usually the only one which can be raised, touching their validity. Consequently the Scotch judicial records contain numerous decisions relating to this doctrine; and, as the doctrine appears to be identical there and here, our illustrations from the Scotch books will be pertinent.

§ 221. **Consent to what — What is Marriage?** — When parties come together, and in words agree to be husband and wife, the law settles what the terms of the agreement are; for it defines the duties, the nature, and the duration of the marriage relation. But suppose, that, instead of saying to each other, — "We are to be henceforward husband and wife," they use some other words, such as, — "We will beget children; and, when we are tired of this bargain, we will dissolve it;" or, — "We will be as husband and wife to each other for ten years;" and the like, — what is the effect of such an agreement? or, in other words, — where the parties, instead of agreeing in express language to be husband and wife, specify what they agree to do, and how they agree to stand to each other, how much and what must be said and done to superinduce the marriage status?

§ 222. **Continued — Indian Marriages — Divorces allowed, &c.** — Where, within principles to be more particularly stated in other chapters,[1] parties are married upon territory occupied and ruled by our North American Indians, and then remove into one of our States, the marriage is held to be good, notwithstanding by the Indian law they might divorce themselves by a mutual separation. So, in all Christian countries, marriage is regarded as a thing of international law; and parties

[1] Post, § 371 et seq.; Vol. II. § 754.

married in a locality where judicial divorces are allowed are deemed also to be married when they go into a locality where such divorces are forbidden. Yet, to a certain extent and in a certain sense, the marriage which is celebrated under laws allowing of divorces is, in the terms of the contract, a different thing from the marriage which is celebrated where no liberty of divorce is given by law. Likewise, if parties entering into a marriage where by law there could be no divorce, should specify, in articles of agreement, that they should themselves be permitted to divorce each other at pleasure, there is reason to presume — probably there is no decision on the point — that the marriage would be held to be good, and the collateral agreement would be treated as a mere nullity, being a thing done contrary to the policy of the law.[1] Yet there must be somewhere the line dividing cases in which the entering into a forbidden relation between a man and a woman should be deemed no marriage; and cases in which, so far as the contemplated relation was contrary to the law, the violative part of the agreement should be held null, while the main thing, the marriage, should be held good.

§ 223. **Continued — Indian Marriages.** — There is a Missouri case, in which the question was, whether certain children, born in an Indian country of an Indian woman with whom the white father cohabited there, afterward bringing them away but leaving the mother behind, and recognized in Missouri as legitimate, were, in law, his legitimate offspring; and this question depended on another, namely, whether the law deemed the father to have been the husband of the mother. The court below instructed the jury, that, unless the agreement between this white man and this Indian woman was "to live their whole lives together in a state of union as husband and wife, it was not a marriage, nor are the children of such union capable of inheriting from the father." But when the case went thence before the higher tribunal, this instruction was, by it, held to be wrong. It was too restrictive; it would operate to nullify all Indian marriages. Said Napton, J.: "In most of the tribes, perhaps in all, the under-

[1] See Barnett *v.* Kimmell, 11 Casey, 13; Harrod *v.* Harrod, 1 Kay & Johns. 4, 16.

standing of the parties is, that the husband may dissolve the contract at his pleasure." Again: "It is plain, that, among the savage tribes on this continent, marriage is merely a natural contract, and that neither law, custom, nor religion has affixed to it any conditions or limitations or forms, other than what nature has itself prescribed."[1] Still, on the other hand, there is in a North Carolina case an intimation against the validity, in a Christian state, of a marriage of this sort,[2] and indeed it is difficult to draw the lines between cases of this general description, and say where marriage begins and where it ends. Not all sexual unions between uncivilized people can be marriages. "What, then," asked Perkins, J., in an Indiana case, "constitutes the thing called a marriage? What is it in the eye of the *jus gentium?* It is the union of one man and one woman 'so long as they both shall live,' to the exclusion of all others, by an obligation which, during that time, the parties cannot, of their own volition and act, dissolve, but which can be dissolved only by authority of the State. Nothing short of this is marriage." And this utterance is followed by an intimation against the marriages we are contemplating in this section.[3]

§ 224. **Continued — Agreeing to "live as Man and Wife" — Temporary Arrangement.** — In a California case it was held, that living together "as man and wife" is not marriage, neither is an agreement so to live a contract of marriage, especially where from the facts the arrangement appears to have been only temporary; and, at the death of the man in such a case, his concubine cannot inherit as a wife. The question arose upon a demurrer to the complaint of the plaintiff woman, who, on the death of the man, brought her suit for a share of his estate. The complaint — that is, the declaration — alleged, "that, on the day and year first above mentioned, while engaged in the business aforesaid [keeping a restaurant] W. J. Cady made proposals of marriage to her, which proposals she accepted; and, in accordance with his expressed wishes,

[1] Johnson *v.* Johnson, 30 Misso. 72, 84, 86, 88; referring to Wall *v.* Williamson, 8 Ala. 48; Wall *v.* Williams, 11 Ala. 826; Morgan *v.* McGhee, 5 Humph. 13.

[2] The State *v.* Ta-cha-na-tah, 64 N. C. 614.

[3] Roche *v.* Washington, 19 Ind. 53, 57.

consented to relinquish her then business, sell out her property, and live with him as his true and lawful wife; that, in obedience to this request on his part, she did abandon her business, and, by his aid and assistance, sell out and dispose of her said property, and give the proceeds thereof to him, and from thenceforth lived and cohabited with him as his wife, always conducting herself as a true, faithful, and affectionate wife should do." And the judge, sustaining the demurrer, observed: "From the character of the allegations, and the pregnant fact that the plaintiff does not even sue in her marital name, except under an *alias*, we are led to the inference that the arrangement between her and the deceased was intended to be temporary, and the connection one to which it would be a perversion of language to apply the name of marriage."[1]

§ 225. **Continued — Observations.** — The foregoing decision by the Missouri tribunal appears to be just when we reflect, that to distinguish between Indian marriages, and marriages in more civilized communities where divorces are more freely allowed than under our own laws, would not be easy; indeed, it would require the drawing of lines quite too fine for practical use. And this decision, though not only in conflict with the others mentioned in the same section, but apparently so with the California one, likewise may be right, and the California decision likewise right. The Indian nations are in law foreign to our own; and there is a difference in law between allowing a foreign marriage to be valid, and according validity to a like marriage at home. We have treaties with the Indian nations; and, since marriage is *jus gentium*, our courts ought, if possible, so to press the legal principles governing their decisions as to hold to be good the marriage of those people with whom we maintain international relations. But there is grave doubt whether the California adjudication should be elsewhere followed. If, practically, a man and woman recognize each other as, *in substance* (to use an expression which, at least, can be understood), husband and wife, though they attempt to restrict the operation of the law upon their relation, public

[1] Letters *v.* Cady, 10 Cal. 533, 534, 537. And see Jewell *v.* Jewell, 1 How. U. S. 219.

policy, the peace of the community, and the good order of society demand, that the law should hold them to be married persons, bound by all the laws pertaining to marriage, unless some statute compels a contrary decision.

§ 225 *a*. **Continued — Mormon Marriages.** — If a man enters into a valid marriage, and then enters into a second one while the first subsists, the second marriage, though celebrated in a country where polygamy is allowed, and valid at home, will not be tolerated in any country in which polygamy is forbidden.[1] But if the first marriage takes place in a country where polygamy is allowed, is it, while good at home, good elsewhere? The English Divorce Court, having before it a marriage of this sort, celebrated between Mormons in Utah, held that it was not a marriage, within the meaning of the law giving it a jurisdiction to dissolve marriages. "I conceive," said Lord Penzance, "that marriage, as understood in Christendom, may, for this purpose, be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." In the present instance, all others were not, by the terms of the contract, to be excluded; therefore the contract did not constitute the parties husband and wife, within the meaning of the English law.[2] "A counsellor of the United States proved," in this case, says the Report, "that a marriage by Brigham Young, in Utah, if valid in Utah, would be recognized as valid by the Supreme Court of the United States, provided that the parties were both unmarried at the time when it was contracted, and that they were both capable of contracting marriage." It is scarcely necessary to add, that, whether this opinion is sound or not, it is mere opinion, and we have no adjudications of our own on the subject.

§ 226. **Continued — Union to procreate and bring up Children — Duration of it.** — Lord Stowell says, in terms the general correctness of which cannot be doubted, that "a marriage is not every casual commerce; nor would it be so even in the law of nature. A mere carnal commerce, without the intention of cohabitation, and bringing up of children, would not constitute marriage under any supposition. But when two persons agree

[1] Post, § 372, 376.

[2] Hyde *v.* Hyde, Law Rep. 1 P. & M. 130, 133. See post, § 372, note.

to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation, — that, in a state of nature, would be a marriage, and, in the absence of all civil and religious institutions, might safely be presumed to be, as it is popularly called, a *marriage in the sight of God.*"[1] And perhaps we cannot object to a decision which holds, that a written instrument between a man and a woman, by which they mutually promise to live together as husband and wife *as long as they can agree*, does not constitute marriage;[2] at least, the question should be, whether the parties did take each other as, *in substance*, husband and wife, and did so live. Yet a mere understanding that they might divorce each other at pleasure, whether the understanding was written or verbal, should certainly not be construed to prevent the status of matrimony from attaching to them. Of course, an agreement of this sort between the parties would be void; but not unfrequently the courts hold to be void some contract entered into at the time of the marriage, while the sufficiency of the marriage itself is not denied.

§ 227. **Nature of the Consent — Present, not Future — Future followed by Copula.** — The consent essential to marriage must contemplate a present assumption of the status, in distinction from a mere future union.[3] The agreement of future marriage is termed espousals *de futuro*, or a contract *per verba de futuro;* while the agreement which superinduces the status is termed espousals *de præsenti*, or a contract *per verba de præsenti*. Swinburne illustrates the one as occurring where the man says to the woman, "I will take thee to my wife," and she answers, "I will take thee to my husband;" the other, where the man says to the woman, "I do take thee to my wife," and she replies, "I do take thee to my husband."[4] When, as further on will appear, a contract of future marriage exists, and the parties have sexual intercourse, the law usually presumes the intercourse lawful, the parties having changed their future into a present consent, making themselves thereby husband and wife. Hence it is said, that marriage may be

[1] Lindo *v.* Belisario, 1 Hag. Con. 216, 4 Eng. Ec. 367, 374.

[2] Randall's Case, 5 N. Y. City Hall Recorder, 141, 152.

[3] 1 Fras. Dom. Rel. 149.

[4] Swinb. Spousals, 2d ed. 8; 2 Burn Ec. Law, Phillim. ed. 455 *e*; Brown *v.* Brown, 13 Jur. 370.

contracted *per verba de præsenti* merely, or *per verba de futuro cum copula*.[1]

§ 228. **The Consummation.** — But the copula is no part of the marriage; it only serves, to some extent, as evidence of marriage.[2] A maxim of the civil law, equally also of the ecclesiastical, of the common, indeed of all law governing the subject, is, *Consensus, non concubitus, facit matrimonium*.[3] Hence when parties, capable of intermarrying, agree to present marriage, the matrimonial relation is made thereby complete, and what is sometimes called the consummation adds nothing to it. This is true everywhere; subject to the qualification, that in some countries there are statutes requiring the addition of specified ceremonies and forms; but the copula gives the marriage nowhere any additional strength.[4]

II. *The Consent, how given in the Absence of a Specific Requirement of Law.*

§ 229. **General Doctrine.** — In the next chapter will be considered the question, whether, under the common law, and in States where the statutory forms are not expressly declared to be exclusive of all others, any thing more, or what more, than the consent treated of in this chapter is required to constitute marriage. But everywhere, as respects every thing except the formalities to be treated of there, no particular form for expressing the consent is necessary. Nothing more is needed than that, in language which is mutually understood, or by any thing declaratory of intention, the parties accept of each other as husband and wife.[5] And Swinburne lays down the doctrine, that, if the words do not of their natural meaning or by common use "conclude matrimony," yet, if the parties intend marriage, and their intent sufficiently appears, "they are inseparable man and wife, not only before God, but also

[1] Lord Cottenham, in Stewart *v.* Menzies, 2 Rob. Ap. Cas. 547, 591; post, § 253.

[2] Dumaresly *v.* Fishly, 3 A. K. Mar. 368, 372; Jackson *v.* Winne, 7 Wend. 47.

[3] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 4 Eng. Ec. 485, 489; Shelford Mar. & Div. 5–7.

[4] Lindo *v.* Belisario, 1 Hag. Con. 216, 4 Eng. Ec. 367, 374; Patrick *v.* Patrick, 3 Phillim. 496; Jackson *v.* Winne, 7 Wend. 47; Dumaresly *v.* Fishly, 3 A. K. Mar. 368; Walton *v.* Rider, 1 Lee, 16, 5 Eng. Ec. 289; Potier *v.* Barclay, 15 Ala. 439; Graham's Case, 2 Lewin, 97; The State *v.* Patterson, 2 Ire. 346.

[5] 1 Fras. Dom. Rel. 145.

before men."[1] The consent may be either verbal[2] or written; and, though there was no ceremony, if the parties merely lived together as husband and wife for many years, they may be deemed in law to be married.[3] In Scotland, the question has most frequently arisen where the consent was in writing.[4] The simplest form of writing is sufficient.[5]

§ 230. **Consent by Interchange of Letters.** — There seems to be no good reason why an agreement of marriage *in præsenti*, like the agreement of marriage *in futuro*, or any other contract, may not be made by interchange of letters through the post-office. Fraser admits that many among the canonist commentators hold this to be so; according to whom, therefore, a perfect marriage may be contracted without the parties even seeing each other, equally as without consummation. But he considers the weight of Scotch authority to be against this sort of marriage. He cites Mr. Clerk, in the case of Dalrymple, who, in testifying to the Scotch law of marriage, said, that, "supposing a marriage should be constituted without either ceremony or consummation, and by mere verbal expressions of consent, yet, if the words are not used, *eo intuitu*, of making and constituting a marriage *de præsenti*, they are ineffectual; and the same is the case if the other party does not join in expressing the consent to marriage *de præsenti*. The consent on both sides ought to be unequivocally expressed, and at the *same time*."[6] Also, "if a man were to write such declarations as those referred to, and were to send them to a woman in a post letter, this would not constitute a marriage, though it would afford evidence that a marriage had antecedently been constituted."[7]

§ 231. **Continued.** — We cannot fail to notice, that the case

[1] Swinb. Spousals, 2d ed. 87.

[2] 1 Fras. Dom. Rel. 145.

[3] Hicks *v.* Cochran, 4 Edw. Ch. 107.

[4] 1 Fras. Dom. Rel. 147.

[5] Ib. The following (ib. p. 148) not very learned production is a specimen of the Gretna Green marriages:

"Gritnay Green, June 10th, 1786.

"This is to sertfay to all persons, that may be scurned, that Charles Blount, from Salisburey, and Elisbith Ann Wyiche, from the same plese, both comes before me, and declares themselves to be both single persons, and is now mareyed by the way of thee Church of Scotland, as day and det abuve mentioned by me.

DAVID M'FARSON.
C. B. BLOUNT.
ELIZTH. ANN WYCHE."

[6] 2 Hag. Con. App. 109.

[7] 2 Hag. Con. App. 108; 1 Fras. Dom. Rel. 155, 156.

put by Mr. Clerk is one of a mere proposition made by one party, and not accepted by the other; which, according to common principles, would not amount to a mutual consent, or contract. But where a man sends to a woman a proposal of marriage *in præsenti;* and, not withdrawing it, receives her answer accepting it; there is a concurrent consent, at the same instant, of the two minds to the same thing. And Lord Henderland, a Scotch judge, in a manuscript case also cited by Fraser, seems to take ground even a step further in advance. The letters, he said, "did not, indeed, contain any express declaration of marriage; but they could not, in common sense, be attributed to any purpose but that of intending a marriage, and what difference made it whether a person wrote, 'I am your husband,' or signed 'your husband,' at the bottom of the letter. The cases of Arnot, Loup, McCarter, Miss Murray, were all cases of marriage so made. It signified nothing that there was no writing on her side; for *her course of acceptance of his letters would bind her.*"[1] Letters may be, in Mr. Fraser's opinion, important evidence of marriage; and he tells us, that, in a number of cases, marriages have been declared chiefly on their authority.[2] By Swinburne the doctrine is broadly laid down, that this relation may be entered into by letter.[3] This, therefore, we should receive as the better common law doctrine; and we may even doubt, whether Mr. Fraser is correct in his view of the law of Scotland.

§ 232. **Continued.** — It is plain, that, in order to make a marriage by letter good if the parties are in different countries, there must be no impediment to the two intermarrying recognized by the laws of either country. Plainly, also, if one of them is in a country in which marriage is good only when formally solemnized, and the other is in a country in which it is good entered into by letter, the courts of neither country can hold the marriage sufficient, where only letters pass. Obviously the courts of the country in which such marriages are not deemed good cannot; but the fact that they cannot, shows also that the

[1] Inglis *v.* Robertson, 1 Fras. Dom. Rel. 157, A. D. 1786. The case in which these observations occurred, however, was one wherein copula had actually taken place; and so the letters might be regarded rather as evidencing, than constituting, the marriage.

[2] 1 Fras. Dom. Rel. 155, 158.

[3] Swinb. Spousals, 2d ed. 162, 181, 183.

courts of the other country cannot. Because, since the laws of no country can operate to change the status of a person who is neither in it in fact nor domiciled in it, if the tribunals of the country allowing marriage by letter should undertake to pronounce the person within their jurisdiction married, not pronouncing, since they could not, the other to be married also, their judgment could not have this effect; inasmuch as, in the nature of the marriage relation, no man can be a husband unless he has a wife; no woman a wife, unless she has a husband. Therefore, in a Scotch case, the man being in France, where informal marriages are not valid; and the woman in Scotland, where they are valid; the court denied that letters could make them husband and wife. And the Lord President observed: "I can find no authority in support of the possibility of a marriage, where one of the parties is in this country and the other is out of it."[1] This view does not militate against the general ability to marry by letter.

III. *Consent in Form but not in Fact.*

§ 233. **How, where the Words express Marriage, but the Parties do not mean it.** — The question has been considerably agitated before the tribunals of Scotland, and before the House of Lords, to which some of the cases have been taken by appeal, to what extent parties who use words expressive of consent are bound by them, when they do not in fact intend matrimony. Mr. Fraser has extracted the rule from the adjudications, as follows: "Although the parties may have exchanged, in words, the most unequivocal consent, there would be no marriage, at least if it be clandestine, if it be proved that they intended something different, only went through the proceeding as a jest, or intended it merely as a blind or cover for some private purpose of their own, and gave, in short, consent in form but not in fact. *Simulatæ nuptiæ nullius momenti sunt.*"[2] The doctrine, otherwise expressed, appears to be, that, in this matter of marriage, consent is so essential as to leave the forms of marriage, into which it does not enter as a thing of

[1] Sassen *v.* Campbell, 3 Scotch Sess. Cas. new ed. 108, 2 Wilson & Shaw, 309.

[2] 1 Fras. Dom. Rel. 213. And see Browne *v.* Burns, 5 Scotch Sess. Cas. N. S. 1288.

fact, mere unfinished and imperfect caskets, to which the law declines intrusting its jewel matrimony. The law will not, in still other words, impose a consent upon parties in whose minds it does not exist in reality, though they have gone through with a form of consenting.[1] There may be some qualification of this doctrine recognized in the law; so we shall see how it stands on the adjudications.

§ 234. **Continued — Form adopted for a Different End.** — In the Scotch case of McInnes *v.* More, after copula and pregnancy following, the man addressed to the woman a letter in these words: "I hereby acknowledge that you are my lawful wife; and you may from this date use my name, though for particular reasons I wish our marriage kept private for some time." She raised a declarator of marriage against him, offering in evidence only this letter, and his judicial examination elicited in the case, wherein he denied the alleged matrimonial consent, and explained the letter as having been given upon her importunity, simply to enable her to obtain admission to the house of a relative for lying-in purposes. The commissaries and the Court of Session held the parties married; but the House of Lords reversed the decision, on the ground that, the matter standing on the letter and his judicial examination taken together, the letter, explained by the examination, appeared neither to have been given by him nor accepted by her, nor understood by either, "as a declaration of the truth, but merely as a color to serve another and a different purpose, which had been mutually concocted between them, the other circumstances of the case concurring to prove the same thing."[2]

§ 235. **Consent meant to be conditional — Not Final Agreement.** — In the Scotch case also of Taylor *v.* Kello, a farmer's daughter, of considerable fortune for a person of her rank, had received the address of a man of equal rank, but reduced to bankruptcy by his own extravagance, and therefore unacceptable to her relatives. He drew the following writing, which she, copying, delivered to him, and took from him another in corresponding terms: "I hereby solemnly declare you, Patrick

[1] And see Clark *v.* Field, 13 Vt. 460. Hag. Con. 54, 101, 4 Eng. Ec. 485, 506.

[2] McInnes *v.* More, Ferg. Consist. Law, Rep. 33, 1 Fras. Dom. Rel. 213; s. c. in Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 101, 4 Eng. Ec. 485, 506. For similar facts, and the same result, see Grant *v.* Mennons, Ferg. Consist. Law, App. 110.

Taylor of Birkenshaw, my just and lawful husband, and remain your affectionate wife, Agnes Kello." Her judicial declaration afterward given was, that she did not consider this a final agreement, and that the man was not to use it without her consent. There was no evidence that *concubitus* had either followed or preceded this transaction, and he mentioned it to none of his friends. On the matter being discovered, the lady's mother requested him to surrender the writing, but he refused. During the next year he continued his visits at the house of the lady; and at length proclamation of banns was consented to, and twice made; but, before the third time, it was stopped by her or her relatives. During the next two years their meetings became infrequent, and in the two years still following they ceased. At the end of these five years from the time of the interchange of the writing, on the woman being about to be married to another man, he instituted his action of declarator of marriage. The commissaries affirmed the marriage; the Court of Session sustained their judgment; but the House of Lords overruled it, as in the last case, and for substantially the same reason. They held, "that the two letters insisted upon in this process, signed by the parties respectively, and mutually exchanged, were not intended by either, or understood by the other, as a final agreement; nor was it intended or understood that they had thereby contracted the state of matrimony, or the relation of husband and wife, from the date thereof; on the contrary, it was expressly agreed that the same should be delivered up, if, the purpose they were calculated to serve proving unattainable, such delivery should be demanded; which last-mentioned agreement is further proved by the whole and uniform subsequent conduct of both parties."[1]

§ 236. **Collateral Purpose, continued.** — So where the man, in a letter of attorney to the woman, acknowledged and declared her to be his wife, — this not being done, as it appeared in evidence, with the intention on the part of either to enter into marriage, but to enable her the better to carry out certain objects contemplated by the letter, — the transaction was held

[1] Taylor *v.* Kello, 1 Fras. Dom. Rel. 214; reversed A. D. 1787. Also in Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 94, 4 Eng. Ec. 485, 503.

not to constitute marriage.[1] In like manner, where the written acknowledgment which the man made to the woman of her being his wife, was intended merely as a device to deceive others, and so enable him to avoid forming with another woman a matrimonial connection to which he objected, what was done was held not sufficient to render the parties married.[2]

§ 237. **One Party not meaning Marriage.** — And whatever difficulties may have attended the question in Scotland formerly, the doctrine has latterly been strongly maintained in the Scotch courts, and it is undoubtedly there established, that, though the words employed distinctly import marriage, and even though they were so understood by one of the parties, yet, if the other party did not intend matrimony, and no copula followed, they will not operate in law to constitute marriage. "The ruling principle," said the Lord Justice-Clerk, "as to the constitution of marriage, is, that it is a *mutual* contract, — a consensual contract, — to the formation of which the consent of both parties must be really, deliberately, definitively, and irrevocably given. . . . It would be, indeed, a most extraordinary practical view of the consensual contract of marriage to hold, that, in respect of the mere words of writings, not followed by any of the consequences of marriage, the parties were really and irrevocably married, although it should be proved, beyond the reach of cavil, that the consent of the lady to real marriage was not given by the words of the writing, and that she did not intend to consent to be married, and never so understood the paper she signed. That would be an extraordinary result."[3] And, in a case of non-consummation also, the further doctrine was laid down, that the intent to marry, must, in the absence of consummation, be shown by evidence beyond the writing, however clear its words in themselves are.[4]

§ 238. **Marriage publicly celebrated — Consummation.** — But where the marriage is regularly, and especially where it is publicly celebrated, according to a form prescribed by law, the

[1] Campbell *v.* Sassen, 2 Wilson & Shaw, 309.

[2] Stewart *v.* Menzies, 2 Rob. Ap. Cas. 547; 1 Fras. Dom. Rel. 215.

[3] Lockyer *v.* Sinclair, 8 Scotch Sess. Cas. N. S. 582. And see Campbell *v.* Sassen, 2 Wilson & Shaw, 309, 319.

[4] Lockyer *v.* Sinclair, supra.

rule of the law may possibly be otherwise than it is in these cases of irregular marriages, entered into by informal writings. And whether the marriage is formal or informal, the doctrine as applied after what is called the consummation has taken place may be different still; for, in the latter circumstances, one who has consented to what is signified by the form, cannot well say he did not mean marriage. In a case of informal writings, no objection on general principles can arise to permitting evidence to be introduced as to whether or not they were intended by the parties to take effect at all as a contract;[1] and only this was done in the Scotch cases before mentioned.[2] Yet there are principles of law which often estop parties to deny a conclusion drawn by the law from their acts. And perhaps, under some circumstances, matrimonial forms may have the consequence of estopping the parties to deny an attendant matrimonial consent.

§ 239. **Continued.** — On this point, some remarks by Lord Stowell in the Dalrymple case are too important to be overlooked; while yet it should be observed, that they have been in part disapproved of in Scotland.[3] Speaking of the matrimonial consent under the Scotch law, he says: "It is said that it must be *serious;* so surely must be all contracts; they must not be the sport of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever; at the same time it is to be presumed, that serious expressions, applied to contracts of so serious a nature as the disposal of a man or woman for life, have a serious import. It is not to be presumed, *a priori*, that a man is

[1] Armstrong *v.* M'Ghee, Addison, 261; Jewell *v.* Jewell, 1 How. U. S. 219; 1 Greenl. Ev. § 284.

[2] In Stewart *v.* Menzies, 2 Rob. Ap. Cas. 547, 592, Lord Cottenham observed: "The cases of Kennedy *v.* Campbell, in 3 Wilson & Shaw, 135, note; McInnes *v.* Moir, Ferg. Consist. Law, App. 125, 128; Taylor *v.* Kello, Mor. 12687; Grant *v.* Mennons, Ferg. Consist. Law, App. 110, and many other cases, prove, what indeed required no such proof, that, to constitute a contract of marriage, there must be contracting parties, and that the expressions used, though of themselves sufficient words of contract, are of no avail if not intended by the parties to have that effect, but are used for some collateral purpose. This in no respect infringes upon the principle of not construing a written contract by extrinsic evidence of intention; the question being, not what the written contract imports, but whether it is to be treated as a contract at all."

[3] Lockyer *v.* Sinclair, 8 Scotch Sess. Cas. N. S. 582, disapproving the doctrine of the concluding part of the next section.

sporting with such dangerous playthings as marriage engagements. Again, it is said, that the *animus contrahentium* must be regarded. Is that peculiar to the marriage contract? It is in the intention of the parties that the substance of every species of contract subsists, and what is beyond or adverse to their intent does not belong to the contract. But then that intention is to be collected (primarily at least) from the words in which it was expressed; and, in some systems of law, as in our own, it is pretty exclusively so to be collected. You are not to travel out of the intention expressed by the words, to substitute an intention totally different, and possibly inconsistent with the words. By the matrimonial law of Scotland, a latitude is allowed, which to us (if we had any right to exercise a judgment of the institutions of other countries with which they are well satisfied) might appear somewhat hazardous, of substituting another serious intention than that which the words express, to be proved by evidence extrinsic, and totally, as we phrase it, *dehors* the instrument. This latitude is indulged in Scotland to a very great degree indeed, according to Mr. Erskine. In all other countries, a solemn marriage *in facie Ecclesiæ facit fidem*, the parties are concluded to mean seriously, and deliberately, and intentionally, what they have avowed in the presence of God and man, under all the sanctions of religion and of law; not so in Scotland, where all this may pass, as Mr. Erskine relates, and yet the parties are at liberty to show, that, by virtue of a private understanding between themselves, all this is a mere imposition and mockery, without being entitled to any effect whatever.

§ 240. **Continued — One of the Parties.** — "But," continues the learned judge, "be the law so, still, it lies upon the party who impeaches the intention expressed by the words, to answer two demands, which the law, I conceive, must be presumed to make upon him: first, he must assign and prove some other intention; and, secondly, he must also prove that the intention so alleged by him was fully understood by the other party to the contract at the time it was entered into. For surely it cannot be represented as the law of any civilized country, that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to

aver a private intention, reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted. I presume, therefore, that what is said by Mr. Cragie can have no such meaning, 'that, if there is reason to conclude, from the expressions used, that both or *either* of the parties did not understand that they were truly man and wife, it would enter into the question, whether married or not,' because this would open a door to frauds, which the justice, and humanity, and policy of all law must be anxious to keep shut." [1]

§ 241. Continued. — What is said by Mr. Erskine, to which probably Lord Stowell refers in the foregoing extract, is the following: "As marriage *in facie Ecclesiæ*, by the law of Scotland, is neither a sacrament nor a necessary ceremony to constitute the matrimonial union, cases might occur where a marriage by a clergyman might be insufficient, from its being proved that, anterior to the celebration, the parties had interchanged written declarations that the ceremony was to be effected for a totally different purpose, and should not be binding upon either of them. But the respondent conceives, that to take off the effect of a written consent *de præsenti*, or a promise of marriage followed by a copula, will require the most clear and decisive facts applicable to both the parties, sufficient to show that the written declaration or promise was given for a purpose different from that of contracting marriage, and a proof of those facts by the most unquestionable evidence." [2] Professor More, in his Notes on Stair, lays down the proposition, that "the most formal acknowledgment of marriage, even though made *in facie Ecclesiæ*, will be of no avail, if it shall appear that such was not the true intention of the parties." [3] But Mr. Fraser has shown, that none of the cases referred to by him support this proposition, as to marriage *in facie Ecclesiæ;* and that, though this question has been mooted, and opposite opinions have been expressed upon it, by Scotch lawyers, yet it remains undecided in Scotland.[4]

[1] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 105, 4 Eng. Ec. 485, 508, 509. And see Cunninghams *v.* Cunninghams, 2 Dow, 482, 485; Lords Brougham and Campbell in Hamilton *v.* Hamilton, 9 Cl. & F. 327, 348, 352; Swinb. Sponsals, 84, 87.

[2] 2 Hag. Con. App. 26.

[3] More's Notes, p. xiv.

[4] 1 Fras. Dom. Rel. 217–221.

§ 242. **Continued — Informal Marriages.** — We have already seen,[1] that, as concerns informal marriages entered into by mere word, written or oral, the doctrine established in the Scotch courts has strong support in the ordinary doctrines of our common law as applied to other things. We must, therefore, understand the foregoing observations by Lord Stowell to be, in spite of his great name, slightly inaccurate. And we are not to presume that the House of Lords, in deciding the before-mentioned Scotch cases of McInnes *v.* More, and Taylor *v.* Kello,[2] though proceeding according to Scotch law,[3] supposed themselves to be overruling the decisions of the highest tribunal of Scotland by the introduction of a principle foreign to the law of England. Consequently we may conclude that no difference exists between the English and Scotch doctrine on this subject, other than is created by the English marriage acts, all adopted since the settlement of this country; the result of which is, that the law with us, in States where no change has been wrought by legislation, is the same as established in Scotland. Still, we must remember that the doctrine refers merely to informal marriages.

§ 243. **Formal Marriages, again.** — Obviously, where there has been a public celebration of marriage, especially in a form prescribed by statute, the cases must be rare in which an intent other than matrimonial could, as a question of fact, be established. And, as already intimated,[4] if copula had followed such celebration, principles of public policy would seem to forbid either or both of the parties to show, that the real matrimonial consent had not passed. The point, moreover, has been stated thus: on the one hand it is said, that "there are others concerned in the marriage besides the parties themselves. It produces a new status of the parties in society, the creation and nature of which is *juris publici*. And if the requisites to create this status have once occurred, the relations consequent on it immediately take place, whatever latent purposes one or both of the parties have entertained."[5] On the other hand it is urged, and on this reasoning the decisions

[1] Ante, § 238.
[2] Ante, § 234, 235.
[3] Warrender *v.* Warrender, 2 Cl. & F. 488, 561, 567.
[4] Ante, § 238.
[5] Lord Meadowbank, Ferg. Consist. Law, App. 124.

above cited proceed, that, admitting the evils of the parties' imposture, the proper remedy is not to repay imposture by fiction, and to enforce a consensual contract upon persons who have not in fact consented; that the imposture, though profligate and pernicious, is of the same description with many other things for which the law provides no remedy, as where a man imposes his bastard on society as his lawful child.[1] And certainly it would be a marked exception to general rules, to compel persons to assume the status of marriage, and the civil duties of husband and wife, against their will, as a punishment either for trifling with the forms of matrimony, or for any other blameworthy conduct.[2] At the same time, there must be a point here beyond which such frivolity cannot go.

§ 244. **Continued — Mock Marriages.** — It is remarkable that this question has received very little judicial elucidation in this country. Among the follies with which people are sometimes chargeable, are mock marriages. Now, if two persons, after going through with a sufficient ceremony, are therefore married, though neither of them intended to be, no subsequent mutual disregard of the bond can undo it; and, if they afterward intermarry with other persons, they are in law polygamists, and their children are illegitimate. And certainly the occurrence would be a novel one, for a gray-haired parent to find himself indicted on the charge of polygamy, and his issue in danger of being declared bastards, because it had been ascertained that he, when a boy of fourteen years, had participated in the sport of a mock marriage with a girl of twelve. But while all must agree, that, in these cases wherein neither the parties nor the spectators understand marriage to be intended, and cohabitation does not follow, the mere form idly pronounced does not make marriage, still the result may be different under many circumstances, in which there is a secret intent in one or both of the parties not to be bound by the ceremony. The rule of law for extreme cases may be plain to common apprehension, but what lies between the extremes must be left somewhat to be determined by future adjudications.

[1] 1 Fras. Dom. Rel. 620.

[2] And see Peat's Case, 2 Lewin, 288.

§ 244 *a*. **Mock Marriages, continued.** — On this subject of mock marriages, however, there is a late New Jersey case which is quite distinct and satisfactory. It was there laid down, that intention is an essential ingredient in the contract of present marriage, the same as in every other contract. Consequently a marriage ceremony which is gone through with in jest does not make the parties husband and wife; and it is so, even though the ceremony is conducted by an official person, authorized to celebrate marriage, and he is in doubt whether the parties are in earnest or not. Said Chancellor Green: "Mere words, without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention; and, if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case, the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage."[1]

§ 245. **Intent to make Betrothal binding.** — The following case once came before the Vice-Chancellor of New York: A young man, twenty-three years of age, paid his addresses to a girl of sixteen, and the two became mutually attached. Her parents, to withdraw her from his attentions, were about removing her away, when he, fearing he should lose her, induced her to go with him to a clergyman's house and be married; which was done, with the concurrent understanding that the ceremony should not be considered binding as a marriage, but only as rendering their engagement of future marriage with each other stronger. On their way to the clergyman's house he asserted that the marriage should be mere form; that they should not be esteemed husband and wife for two years; neither should they, until the parents' consent had been obtained, and the ceremony performed anew. There was no consummation, and a day or two afterward the girl told her parents of her imprudence. Opposition arose on their part; then she lost her affection for him; and he claimed that this was a valid marriage. Suit was brought on her behalf to

[1] McClurg *v.* Terry, 6 C. E. Green, 225.

have it declared null, and a decree was entered accordingly.[1] This case contains some of the elements of fraud; but there is no apparent difference, whether he intended, at the time the ceremony was performed, to rely upon it afterward as a marriage, or whether the intent to do so was an after-thought. The decision accords with the Scotch doctrine as to consent in form, given to accomplish a collateral purpose.[2]

IV. *Further Views of the Consent per Verba de Præsenti.*

§ 246. **Three Forms of Consent — In Essence one.** — In the discussion of this question of consent, we are led to inquire how the doctrine has been divided by those who have gone before. And we learn that there are three forms of consent spoken of in the books; namely, consent *per verba de præsenti*, consent *per verba de futuro cum copula*, and consent by habit and repute. But strictly and philosophically the last two are only special manifestations of the first one; and accordingly our discussion thus far in this chapter has proceeded on the idea of the consent being a unit, and expressed by words of present promise. Let us consider it in this form a little further before we look at the other two forms.

§ 247. **Consent and Proof of it distinguished — Woman not joining in the Promise.** — We have already seen, that, to constitute marriage, the consent of the parties must be mutual, and given at the same instant. But a distinction exists between the consent itself and the surrounding indications or proofs of it.[3] Therefore when a man, while cohabiting with a woman who had borne him children, wrote, with her knowledge, and committed to his agent under an injunction of secrecy, a letter declaring her to be his wife, and subsequently on his death-bed spoke to her of the letter, it was held, that his agent might be considered as her agent also, and that, under all the circumstances of the case, the cohabitation continuing for years after the letter was written, a mutual consent might be inferred.[4]

[1] Robertson *v.* Cowdry, 2 West. Law Jour. 191, 1 S. W. Law Jour. 167. And see Mount Holly *v.* Andover, 11 Vt. 226; Clark *v.* Field, 13 Vt. 460; Barnes *v.* Wyethe, 28 Vt. 41.

[2] Ante, § 234, 236.

[3] See Honyman *v.* Campbell, 5 Wilson & Shaw, 92.

[4] Hamilton *v.* Hamilton, 1 Bell Ap. Cas. 736, 9 Cl. & F. 327; 1 Fras. Dom. Rel. 150.

Though the woman did not join the husband in an express written or oral agreement, such an agreement was presumed from the circumstances.[1]

§ 248. **Woman not joining, continued.** — In the case just mentioned, the facts were open to inference; but, where they are not, the consent of both the parties must be clear and direct. This point is illustrated in a Pennsylvania case, as seen in the following extract from the opinion by Tilghman, C. J.: "The defendant pleaded that he was married to the plaintiff, on which issue was joined, and it was objected that the judge ought to have directed the jury that the evidence proved the marriage. The judge laid down the law correctly. He told the jury, that marriage was a civil contract, which might be completed by any words in the present time, without regard to form. He told them also, that, in his opinion, the words proved did not constitute a marriage; and in this I agree with him. The plaintiff and defendant came to their lawyer, Mr. Watts, on business, without any intention of marrying. They had long lived in an adulterous intercourse, although they considered themselves as lawfully married. In fact they had entered into a marriage contract, which was void because the defendant had a former wife living, from whom he had been separated by consent, but not legally. Some time before the parties came to Mr. Watts a legal divorce had been pronounced, and Mr. Watts advised them to celebrate a new marriage. The defendant said: 'I take you (the plaintiff) for my wife;' and the plaintiff, being told that if she would say the same thing the marriage would be complete, answered: 'To be sure he is my husband, good enough.' Now these words of the woman do not constitute a present contract, but allude to the past contract, which she always asserted to be a lawful marriage. Mr. Watts advised them to repeat the marriage in a solemn manner before a clergyman, which was never done. So that, under all the circumstances, it appears to me that what was done was too slight and too equivocal to establish a marriage."[2] But although this case illustrates a principle, there is room for doubt whether it was correctly decided. The presumptions of law are in favor of marriage between parties living together

[1] See Hutton *v.* Mansell, Holt, 458. [2] Hantz *v.* Sealy, 6 Binn. 405.

as husband and wife;[1] and certainly no forced construction would be required to consider the words used by the woman, in the presence of Mr. Watts, as an affirmative response to those of the man. Further than this also, where parties are living together under both the wish and the belief of being husband and wife, if an impediment of to-day prevents the legal status from being superinduced thereby, and to-morrow the impediment is removed, there is reason to hold, that the status uprises as the impediment sinks.[2] This observation applies to a case only where marriage may be constituted by consent alone, and where in fact the parties both desire marriage and are cohabiting while the impediment is not subsisting. And there is a class of authorities which at least would permit the jury in these circumstances to infer an agreement of marriage entered into after the impediment was removed. At the same time, it is fair to observe of this Pennsylvania case, that the woman, in bringing her suit against the man, showed her own intent then to be, not to be considered his wife; disaffirming thereby the marriage, as far as she was able.

§ 249. **Something to intervene between Consent and Marriage.** — The consent, to constitute present marriage, must not be attended by an agreement that some intervening thing shall be done before the marriage takes effect; as, that it be publicly solemnized.[3] The question in a case of this sort is, whether the qualifying matter was meant to delay the nuptials, or was introduced for some other purpose; as, to satisfy scruples, or for appearance and good order. To illustrate: In Scotland, a woman who had been delivered of a bastard child went to the putative father, and threatened to destroy herself if he did not give her a line acknowledging her to be his wife. He gave her the following: "My dear, as a full testimony of my regard and affection for you, I hereby agree and bind myself to be your real husband in all senses of the word, and expects only the common ceremony of the outward rule of marriage, and . . . I do hereby bind and oblige myself

[1] Ante, § 13; post, § 434, 443, 457–459.

[2] See, post, the chapter commencing § 503.

[3] Lord Brougham, in Reg. *v.* Millis, 10 Cl. & F. 534, 708, 730; Lord Campbell, ib. p. 748, 783, 797. And see Stewart *v.* Menzies, 2 Rob. Ap. Cas. 547, 591; Clark *v.* Field, 13 Vt. 460.

to accept of you as my lawful wife, and is ready and willing to accept the common rite here put in execution in a public manner; or, if that cannot be conveniently done, suiting to all parties, I am agreeable to accept to any measure you think proper yourself, so as we may be united together in marriage. To this I sign my name as your real husband." It appeared from his judicial examination, that he understood himself bound by this declaration, and not at liberty to marry another; and that he had no doubt the woman, when she received it, understood herself to be bound in like manner. Connecting this admission with the writing itself, the court pronounced for the marriage.[1] So where the man, besides introducing the woman to respectable people as his wife, wrote and subscribed the following, which he gave her: "I Her by aknolidg and own that I am maryed to Elsepeth Curriaa, as soon as I got all things put to rights, or my affairs are that I am not to see you in no ways distress, until that I proved (provide) for you, which I hop will not be long. This is all from your's, David Turnbull,"— the majority of the court were of opinion, that a clear acknowledgment *de præsenti* was contained in the opening words of the writing, and that the sequel, though somewhat confused, was a statement of his reasons for delaying to take her home as his wife, and a promise to provide for her in the mean time. The case, however, contained in itself other evidence sufficient to establish the marriage; namely, oral acknowledgments followed by copula.[2]

§ 249 *a*. **Continued.** — On the other hand, in an Alabama case, the facts were the following. A man being on trial for murder, a woman was produced as a witness against him, who, on her *voir dire*, stated, that she and the defendant agreed to marry; that he told her he could not get a license for them to marry then, because "all the old licenses had run out;" but, "as soon as the new licenses came in," he would get one and marry her, and upon this agreement they cohabited. It was thereupon held, that she was not his wife, consequently

[1] Edmeston *v.* Cochrane, 1 Fras. Dom. Rel. 153.

[2] Currie *v.* Turnbull, Hume, 373, 1 Fras. Dom. Rel. 154. That the mere agreement to have the marriage formally celebrated at a future time, does not prevent the matrimonial status from being superinduced on a present promise with cohabitation, see Grotgen *v.* Grotgen, 3 Bradf. 373.

she was a competent witness. The agreement referred to the future. It was a mutual undertaking to marry at a subsequent time, on the transpiring of a future event, — the procurement of a license. The cohabitation, which took place, necessarily preceded the consent on which the agreement to marry was to be consummated in a present marriage, and was, therefore, not in fulfilment of the matrimonial agreement, but in advance of an anticipated marriage.[1]

§ 250. **Successive Declarations of Consent.** — Where successive declarations of present promise are made, the first ones are not superseded and rendered null by those which follow. Indeed, they could not be; since, if they were sufficient to constitute marriage, no agreement of the parties could annul it.[2] In one case there were three several and distinct declarations on different days. The first was, "We swear we will marry one another." The second, "I take you for my wife, and swear never to marry any other woman." And the third was a repetition of the second. It was contended against this marriage, that the iteration of the second declaration showed the parties not to have intended to depend on the first one, being in effect a disclaimer of the first. But the Court of Delegates overruled the objection, and the Chancellor refused a commission of review.[3]

§ 251. **Continued.** — So the Dalrymple case was held to be one of marriage *per verba de præsenti;* and, though copula followed, it was not necessary to perfect the marriage. There the consent lay chiefly in three several mutual writings, made on different occasions. The first was, "I do hereby promise to marry you as soon as it is in my power, and never marry another," signed by the gentleman; the lady adding, over her signature, "and I promise the same." This paper was indorsed, "a sacred promise." The second paper was, "I hereby declare that Johanna Gordon is my lawful wife," signed by him; "and I hereby acknowledge John Dalrymple as my lawful husband," signed by her. The third was, "I

[1] Robertson *v.* The State, 42 Ala. 509. See post, § 262.

[2] Hoggan *v.* Cragie, Maclean & Rob. 942, 974.

[3] Fitzmaurice *v.* Fitzmaurice, cited in Walton *v.* Rider, 1 Lee, 16, 28, 5 Eng. Ec. 289, 295; also in Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 69, 4 Eng. Ec. 485, 492.

hereby declare Johanna Gordon to be my lawful wife, and as such I shall acknowledge her the moment I have it in my power. J. W. Dalrymple. I hereby promise that nothing but the greatest necessity (necessity which situation alone can justify) shall ever force me to declare this marriage. J. Gordon, (now) J. Dalrymple. Witness, Charlotte Gordon." The last two papers were enclosed in an envelope superscribed, "Sacred promises and engagements." They were all produced by Miss Gordon, in whose possession they had remained, and they were held to establish the marriage.[1]

§ 251 *a*. **"We are married" — Wedding Ring, &c.** — A man and woman, being engaged to be married, the former told the latter he did not believe in marriage ceremonies, and asked her to waive the ceremony, saying the marriage would be equally valid without it. She consented, and fixed a day for the marriage. On that day, while they were riding together in a carriage, he put a ring upon her finger, saying: "This is your wedding ring; we are married." She received the ring as a wedding ring. He then said: "We are married. I will live with you, and take care of you, all the days of my life, as my wife." She assented to this, and they went to a house where he had previously engaged board for "himself and wife," and there they lived together as husband and wife for about five weeks; he treating her as his wife, and addressing and speaking of her as such. This was held, in New York, on a suit for divorce, to constitute a valid marriage.[2]

§ 252. **Agreement of Secrecy.** — An agreement to keep the marriage secret will not invalidate it, neither necessarily involve in doubt the proofs of its existence. Such an agreement, it was observed by Lord Stowell, sometimes attends the most regular marriages, "from prudential reasons; from the same motive it almost always does private or clandestine marriages. It is only an evidence against the existence of a marriage when no such prudential reasons can be assigned for it,

[1] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 4 Eng. Ec. 485. See also 2 Hag. Con. App. 144; Piers *v.* Piers, 2 H. L. Cas. 331.

[2] Bissell *v.* Bissell, 55 Barb. 325, 7 Abb. Pr. N. S. 16. And see Van Tuyl *v.* Van Tuyl, 57 Barb. 235, 8 Abb. Pr. N. S. 5.

and when every thing, arising from the very nature of marriage, calls for its publication." [1]

V. *Consent per Verba de Futuro cum Copula.*

§ 253. **General Doctrine.** — We have already seen,[2] that, according to the language usually employed in the books, if parties are engaged to be married, and then, such engagement remaining unrevoked, have carnal intercourse, the engagement and copula, connected together, amount in law to a present consent; constituting what is termed marriage *per verba de futuro cum copula*. The reason is, that the copula is presumed to have been allowed on the faith of the marriage promise; and that so the parties, at the time of the copula, accepted of each other as husband and wife.[3] The doctrine, it will be observed, is not a technical one pertaining to the marriage law, but it is a recognition, in this department of the law, of the fact recognized and acted upon throughout the entire domain of our jurisprudence, and probably in every system of cultivated juridical science, that the common course [4] of human actions is lawful and not unlawful; and so, when an act is equally susceptible of two interpretations, by the one of which it is lawful and by the other it is unlawful, and there is no proof as to which it was in the particular instance, the presumptions shall be in favor of the interpretation which makes it innocent.[5] Applying this doctrine to the law of marriage, if parties have entered into an agreement to marry each other, and if no formal ceremonies are by law required to make a perfected marriage, then, if they do what is lawful in marriage but without marriage is unlawful, and there is no specific proof as to what was really meant, but we are compelled to draw an inference, common observation, the duty

[1] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 76, 4 Eng. Ec. 485, 495; Swift *v.* Kelly, 3 Knapp, 257; Hamilton *v.* Hamilton, 9 Cl. & F. 327; Ayl. Parer. 364.

[2] Ante, § 227, 246.

[3] Reid *v.* Laing, 1 Shaw. Ap Cas. 440; Stewart *v.* Menzies, 2 Rob. Ap. Cas. 547, 591; Lord Stowell, in Dalrymple *v.* Dalrymple, 2 Hag. Con. 66, 67, 4 Eng. Ec. 490, 491; Fergusson in Ferg. Consist. Law, Rep. 149; 1 Fras. Dom. Rel. 188; Lord Campbell, in Reg. *v.* Millis, 10 Cl. & F. 534, 780; Dumaresly *v.* Fishly, 3 A. K. Mar. 368, 372; Patton *v.* Philadelphia, 1 La. An. 98, 101; Askew *v.* Dupre, 30 Ga. 173.

[4] See Bishop Stat. Crimes, § 1051.

[5] 1 Greenl. Ev. § 34, 35.

of judging charitably the actions of others, and an established principle of evidence extending through the entire legal system, alike demand, that it shall be deemed the parties meant honestly, and so, instead of committing an offence against morality and law, consummated their marriage vow. And, on every principle, if they meant marriage at the time of the act, they could not afterward divorce themselves by denying their original intention.[1] The doctrine in other words is, that, connecting the consent *de futuro* with the copula, and making of the two a present consent, the copula becomes moral and legal, which would otherwise be immoral and illegal. Therefore it is that no solicitations of chastity, or attempts at copula, or other familiarities short of the carnal act, will convert espousals *de futuro* into present matrimony.[2] We shall see, in some future chapters, wherein the proof of marriage in all issues will be considered, that this same presumption of innocence, applied in almost the same way as where it is evoked to convert future into present espousals, is the leading and principal matter in most cases relied on to prove marriage, even where, to make it valid, a formal celebration is required.[3]

§ 253 *a*. **Continued.** — Though this doctrine, as thus stated, is, when it appears in these general terms, too plain in itself, and too firmly imbedded in principles which extend through every part of our jurisprudence, to be denied by any legal person who takes pains to understand it, there are, relating to it, some points upon which differences have been expressed. For example, is the presumption one of law, or of fact? Is it, in the proper circumstances, conclusive, or may it always be rebutted? The difficulty here is, that our whole law of evidence is in a measure blind on questions connected with the nature and effect of presumptions. There are conclusive presumptions, and there are presumptions which may be rebutted. Differences of views may well be entertained as to the one now under consideration. To constitute a marriage, there must be a consent, not merely by one party, but by *both*.[4] Yet

[1] Ante, § 250; Yelverton *v.* Longworth, 2 Scotch Sess. Cas. 3d ser. H. L. 49, 4 Macq. 745; Morrison *v.* Dobson, 8 Scotch Sess. Cas. 3d ser. 347, 355.

[2] Swinb. Spousals, 27, 28, 40, 228.

[3] Post, § 434–449; Bishop Stat. Crimes, § 608 et seq.

[4] Ante, § 218, 219, 237.

we have seen, that it is, at least, questionable whether there are not circumstances in which, especially if there has been a formal solemnization, a party is estopped to deny consent.[1] So, in this case, if, after a marriage engagement between parties, the woman should yield to the man on her faith in his express assurances that it would be a consummation of their marriage, it would not be an application of legal doctrine much to be commended to permit him to set up, in defence to her claim of marriage, that what he meant was, not marriage, but seduction.[2] Yet under other circumstances it would be highly just to permit it to be shown, in rebuttal of the presumption, that both or even one of the parties intended a mere illicit connection, and not matrimony.

§ 253 *b*. **Continued.** — In consequence of this whole doctrine of marriage by consent *per verba de futuro cum copula* having been latterly denied by some American judges who did not take pains to inform themselves of its nature, as will be explained in sections further on, and because such denial involves a marring or destruction of most important fundamental things in our jurisprudence, it becomes necessary that the expositions of the doctrine here should be reasonably full. The latest Scotch case which the author has seen on the subject went to judgment Dec. 17, 1869. In it, the doctrine was pretty well ventilated; it is as follows. According to one of the head-notes, which seems to be accurately drawn, "a man courted a woman and lent her £300 with a view to their marriage. Subsequently copula took place on one occasion, on the faith of which, and of a supposed interchange of consent, the man spoke of the woman in public, and addressed letters to her as his wife for upwards of four years. She, however, during the whole of the same period, openly repudiated the relationship. Thereafter, on being pressed to return the money, she raised an action of declarator of marriage. Held, after proof of the above facts, that marriage had not been constituted, in respect that, although a promise to marry and subsequent copula had been established, the other facts of the case

[1] See the discussion throughout the previous sub-title, ante, § 233–245.

[2] And see, as confirming or illustrating this view, Barnett *v.* Kimmell, 11 Casey, Pa. 13; Johnson *v.* Johnson, 1 Cold. 626; Guardians of the Poor *v.* Nathans, 2 Brews. 149.

disproved any consent to marriage on the part of the woman." The evidence which she introduced to establish the promise to marry consisted in part of letters written by the man to her. Upon these, upon the other facts, and upon the law, Lord Ardmillan observed as follows: "If, in point of fact, the will of the woman at the time of the copula was not to expect or desire the fulfilment of the promise, then there is no marriage. It is said that her consent is proved by legal presumption arising from the fact of copula following on the promise. It may be so proved. In such cases it frequently is so proved. But I am of opinion that the consent of the woman is not necessarily or universally proved by the presumption created by the fact of connection following after promise. Mere sequence in point of time is not sufficient of itself to create the presumption of consent which the law requires. The *post hoc ergo propter hoc* is not absolutely conclusive. It seems to me impossible to exclude all inquiry into the conduct of the parties and the surrounding circumstances of the connection as instructing the motives, feelings, and intentions which prompted or accompanied the act. Of course, the copula may be proved *prout de jure*. In this case, connection on one occasion only has been established. That appears from the letters, and is instructed by the judicial admission of the defender. But in order to the constitution of marriage by promise *subsequente copula*, the copula must be conceded by the woman on the faith of the promise. This is the principle or theory of our law on the subject. The relation of the copula to the promise must be that of a concession or surrender of person by the woman in reliance that the man's promise of marriage will be fulfilled. In the ordinary case of copula following on a promise of marriage, the natural and reasonable presumption is, that the woman desired that the man should fulfil his promise, that she relied upon his doing so, and that she yielded her person on the faith of such fulfilment. That is a very natural presumption; and, in the absence of evidence to the contrary, the law accepts the presumption as sufficiently instructing the required relation between the copula and the promise. But it is not a *præsumptio juris et de jure*. It does not exclude proof to the contrary. I do not mean to say,

that, after the fact of connection following a promise has been proved, the woman can be required to prove the motives and intentions under which either party acted. In the absence of all proof to the contrary, the law will apply the presumption. But the presumption must yield to the fact, if proof be adduced to meet the presumption, and be sufficient to displace and destroy it. Where there is a specific promise in writing, as a bond or letter given by the man to the woman, and accepted and retained by her, the fact of her so accepting and retaining the written promise is of itself a response to the promise, and the presumption will be, that, holding that promise in her possession, she yielded her person on the faith of it. But that element is wanting when the only evidence of the promise is obtained from the construction put upon letters written by the defender after the date of connection. I do not think it can be said to be universally true, that the connection following a promise has been consented to on faith of the promise. I could suppose such a case as a man writing a letter to a woman containing a distinct promise of marriage, and the woman replying, — 'I do not desire or care for your promise of marriage, — send me £5 and I will receive you to-night;' and £5 is sent to her accordingly. Could it be reasonably maintained that connection following upon that letter, and that reply, constituted marriage? I think not. Suppose another case. A gentleman, in the course of an impassioned love-letter, distinctly promises marriage. To this letter the lady, in the more refined but not less licentious sentiment of Eloise, replies, — 'I want no promise of marriage, I do not wish to be restrained by such obligations. No, make me mistress to the man I love.' I am of opinion that connection following upon such a letter and such a reply would not amount to marriage. All relation between the connection and the preceding promise would be disproved, and there would consequently be no room for the presumption that the one had induced the other." Said Lord Kinloch: "When a marriage is sought to be constituted by a promise of marriage made by a man to a woman *subsequente copula*, I think it clear that it is not necessary that the woman prove a formal acceptance by her of the promise. But I consider it indispensable that she

should satisfy the court that the conduct of the man produced in her mind the will and intention to be married to him, and that she yielded her person to his embraces in the belief and purpose of becoming his wife. In the ordinary case, this will be fairly presumable from the copula following on the promise. In the present very singular case, I think the evidence proves directly the contrary to have taken place; for it satisfies me that, at the time of the intercourse, on 5th July, 1864, the pursuer did not yield her person to the defender in the belief and purpose of becoming his wife; and that for years afterwards she resisted the defender's proposals to be married, or to hold herself as married to him. She cannot be now permitted to set up the intercourse as effecting a marriage, which her conduct proves she did not at the time intend."[1]

§ 254. **Not a Separate Form of Matrimony.** — It follows from this view, that marriage by consent *per verba de futuro cum copula* is precisely the same thing as any other informal marriage, and that this expression of it refers merely to the evidence by which it is established. The books indeed employ language from which one who did not consider its exact import, or the particular nature of the subject to which it is applied, might infer that there are really, not merely two ways but three, in which marriage may be constituted, namely, by consent *in præsenti*, by consent *in futuro cum copula*, and by habit and repute, as already observed.[2] But when we look more carefully at the matter, — in other words, when we attempt to transfer from the books to our understandings the exact law of this subject, — we see that there is, in essence, no difference in these forms of marriage; but that the distinction in the terms of the law refers only to the different methods by which the present consent to present matrimony is made legally to appear. At all events, if we consider the marriage *per verba de futuro cum copula* to be of a species differing from the marriage *per verba de præsenti*, or from the marriage by habit and repute, still, the effect of it, the authorities are agreed, is the same.[3]

[1] Morrison *v.* Dobson, 8 Scotch Sess. Cas. 3d ser. 347, 354, 355.

[2] Ante, § 246.

[3] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 4 Eng. Ec. 485. In Reg. *v.* Millis, 10 Cl. & F. 534, it was agreed,

§ 255. **Opinions against this Form of Marriage.** — There has been recently, however, a case decided in the New York Court of Appeals, followed by a like case in Ohio, wherein, by way of dicta, if not of direct adjudication, the judges of these two States entered upon the hitherto novel work of distinguishing the two kinds of marriage — namely, *per verba de præsenti*, and *per verba de futuro cum copula* — from each other; and while admitting the validity of the former, denying that of the latter. In the way of dictum, also, something like this has since been done by a learned district judge, in one of the United States courts.[1] Passing over this dictum, which does not seem to require any special observation, the New York and Ohio decisions would be worthy of careful consideration in those other States in which the question is an open one, were it not for the fact that unfortunately the judges were referred to no books treating of the subject in any full way, nor was the subject explained to them, nor did they have any correct apprehension of the doctrine they supposed they were overruling. This does not appear remarkable when we bear in mind, that these are recent cases, as just observed, decided by judges, indeed, for whom we justly entertain the highest respect, yet decided since it has become necessary in most of our States for men, however eminent, who aspire to the judicial seat, to spend in political party manœuvring the time

on all sides, that espousals *per verba de futuro cum copula* have precisely the same effect as espousals *per verba de præsenti*, whatever that effect in law may be. And see Portynton *v.* Steinbergh, cited in that case from the rolls of the Province of York, ib. 841; Ferg. Consist. Law, 119; Pennycook *v.* Grinton, Ferg. Consist. Law, Rep. 95; Patton *v.* Philadelphia, 1 La. An. 98. In Jewell *v.* Jewell, 1 How. U. S. 219, 233, 234, the question upon which the Supreme Court of the United States was equally divided, — as see post, § 279, — was, whether the following instruction, given by the circuit judge, was correct: "The circuit court held," says the report, "and so instructed the jury, that, if they believed that, before any sexual connection between the parties, they, in the presence of her family and friends, agreed to marry, and did afterward live together as man and wife, the tie was indissoluble even by mutual consent; and that, if the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve, and that it is equally binding as if made *in facie ecclesiæ*." There was no intimation in the Supreme Court, that any distinction could be taken between a marriage by words *de præsenti*, and one by an agreement *de futuro cum copula*.

[1] Holmes *v.* Holmes, 1 Abb. U. S. 525, 538.

which formerly could be allotted to juridical studies; and decided since lawyers have found less profit from going before the courts well furnished with legal authority and argument, than from drumming among clients for the increased business which the greater uncertainty how any cause would be determined has produced. The remedy for the evil thus alluded to is not of a sort requiring discussion here; but it is in place to say, that, when a judicial opinion proceeds on a total misapprehension of the legal rule which it in terms controverts, it can have no just weight in the scale of legal authority.

§ 256. **Continued.** — The judges in the New York case seem to have understood, that the rule by which copula converts espousals *de futuro* into a marriage *de præsenti*, makes the parties husband and wife without their consent, instead of merely holding them to be married, as in other circumstances, when they do consent. And as this question is important, it may not be amiss to quote some of the language employed by the learned chief justice who delivered the opinion, and show, by explanations in brackets, how the court misapprehended the doctrine. He said: "The principle, that a promise followed by intercourse was in some sense a marriage, was a branch of the ecclesiastical system, resulting from the acknowledged jurisdiction of the ecclesiastical courts to compel the performance of such marriages by spiritual censures. [This statement is entirely without foundation of authority, and unsupported by any course of just reasoning. We have seen[1] that the principle is inherent in the common law, though it also extends through the ecclesiastical law, as it does through every other system of cultivated jurisprudence. The ecclesiastical courts, for the purpose of promoting good order, used to compel the public celebration of marriages and promises to marry, both those which were *per verba de futuro*, with or without copula, and those which were *per verba de præsenti*;[2] but the doctrine had already been settled in New York, and this was admitted, that marriage might be good without this public celebration. And it had never been anywhere held, that one court would pronounce any marriage sufficient, merely

[1] Ante, § 253, 253 *a*.

[2] Swinb. Spousals, 2d ed. 222; Jesson *v.* Collins, Holt, 457, 2 Salk. 437; ante, § 112 and note.

because it supposed another court would, afterward, if applied to, compel the parties to marry each other. The bare enunciation of the proposition shows it to be foreign to all correct legal principle.] Having dispensed with that [the ecclesiastical] jurisdiction, we cannot consistently acknowledge any marriage to be valid which requires the intervention of a spiritual court to make it perfect. We must insist upon those circumstances which the law requires in an executed contract upon any other subject. [Very true; but the law governing this species of contract had constituted the evidence of a future promise, and of copula following it, sufficient proof, at least *prima facie*, that the parties, when having the copula, performed what they had mutually promised to perform; made, what they had agreed with each other to make, a contract in the present time; became, what they had undertaken with each other to become, husband and wife; not committing, therefore, what otherwise their act would be, a gross breach of social decorum, of law, and of public and private morals.[1] And this doctrine is neither a novel one, nor one existing only in some musty book of mere ecclesiastical law; it is a branch of a broad principle of universal law and justice; a principle so broad, and sending out so many branches through all the departments of our common law, as to render it worthy even to be introduced where it had not been known before; much more, worthy not to be ejected from a place it was already occupying.] Mutual promises to marry in future are executory, and whatever indiscretions the parties may commit after making such promises, they do not become husband and wife until they have actually given themselves to each other in that relation. [This also is very true; and the doctrine of marriage *per verba de futuro cum copula* proceeds, as already observed, on the idea that, in the absence of circumstances or proofs to the contrary, the parties to a marriage promise shall be presumed to have converted their future into a present consent, instead of violating decency, morality, and law, when yielding themselves to what is implied in the marriage promise. In other words, they shall be presumed to give themselves to each other in the relation of marriage, when, after mutually

[1] Ante, § 252.

promising to enter into it, they mutually give themselves to what is lawful only in this relation. Whether this presumption will in any circumstance be held conclusive, to the extent of precluding a party from introducing evidence of a contrary mutual understanding at the time of copula had, is a question on which opposite opinions may perhaps be entertained, as already intimated, and by and by we shall further see.[1] But supposing it conclusive, still the case does not differ in principle from that of persons voluntarily going through with a public ceremony of marriage, when, as we have seen,[2] they may in some circumstances and according to some opinions be conclusively held to have intended matrimony, instead of merely intending a public diversion or imposition.] That this [the doctrine laid down by the judge] has been the sense of the legal profession and of the courts is evident from the rules relating to several actions in common use. If a man seduce a woman under a promise of marriage [the doctrine of consent *per verba de futuro cum copula* does not make marriage of this, as the learned judge seems to suppose it does[3]], we allow an action for the seduction at the suit of the father, and an action for a breach of the promise at the suit of the daughter. According to the plaintiff's argument [the plaintiff was the party claiming marriage to have been contracted in the way we are considering], both actions would be absurdities; for, the marriage being complete by the act complained of [we have seen that, in these circumstances, the doctrine we are discussing does not make it complete by this act], there would be no seduction, and no breach of promise. So in the action for a breach of promise of marriage, if it appear that the plaintiff, on the faith of the defendant's promise, has been seduced by him, and has become *enceinte*, it is considered as a circumstance of great aggravation, and the damages are proportionably increased; whereas, if the [this] plaintiff's position is sound, the defendant [in the breach of promise suit] by the very act has made all the reparation in his power, and has become the husband of the plaintiff."[4]

§ 257. **Continued.** — Concerning the argument thus drawn

[1] Ante, § 253 *a*, 253 *b*; post, § 259.
[2] Ante, § 233-245.
[3] Post, § 263.
[4] Cheney *v.* Arnold, 15 N. Y. 345.

from the two forms of action mentioned, we must concede that, in the single case, not of seduction under promise of marriage, meaning by this an unlawful intercourse to which the woman consents on the strength of the man's promising to marry her afterward, but of intercourse allowed where the seducer and seduced are already under contract to marry each other at a future time, there are the outward circumstances which may, the intent of the parties concurring, constitute marriage. But the doctrine of marriage *per verba de futuro cum copula* does not make even this necessarily a marriage.[1] And the plaintiff, in each of the actions mentioned, takes the position, by the very bringing of the action, that the particular case is one in which marriage did not take place at the time of the copula. The defendant, of course, gladly abstains from alleging the contrary; because, if he were willing to become the husband of the woman, that would end the action itself. Therefore the New York Court greatly misapprehended in assuming that these forms of action militate against the doctrine under consideration, even supposing the ignorance of plaintiffs and defendants concerning legal rights to be sufficient to establish a rule of law. But such ignorance is not often brought forward to overthrow a legal doctrine resting on an affirmative practice, either of our own courts, or of the English tribunals in early times.

§ 258. **Continued.** — The facts of the Ohio case were, that, while the man had a wife living, he cohabited with the woman, promising to marry her when he could get a divorce from his wife. But he did not try to get the divorce; his wife died; he then renewed his promise of marriage, yet did not fulfil it, and still continued the cohabitation. The adulterous intercourse was held not to be converted by the future promise into a present marriage. Whether this decision was, upon principle or upon authority, sound, will perhaps depend upon considerations attendant on views developed in a few of our next following sections; or, it may be, upon further findings of fact upon the evidence introduced. At present, suffice it to say, that this is really a question of some doubt in the law, and that its decision either way would not furnish matter for much observa-

[1] See, as exactly in point, the case stated ante, § 253 *b*.

tion.[1] But the judge, upon the authority of what he termed "the well considered" New York case just mentioned, laid down the broad doctrine that a marriage promise could not be converted by copula into marriage. And he said: "The idea that a contract for a future marriage, followed by cohabitation as husband and wife, is itself a valid marriage at common law, seems to have obtained currency on the credit of remarks made by several elementary writers of distinguished learning and ability, and by certain judges of high character, speaking by way of *obiter dicta* in cases in which this question was really in no way involved. But the better opinion now seems to be, that these remarks are unsupported by any case actually adjudicated and entitled to be considered as authoritative [what cases are entitled to be considered as authoritative is, of course, mere matter of opinion; there is certainly not even a dictum occurring in any case prior to the New York one, casting suspicion upon what was theretofore the uniform doctrine of the books; and there are, in the notes to these sections, cases which to the writer seem conclusive of the question, as express decisions, though a judge in a particular State might hold them not to be binding in his State], and that such a contract never was a good marriage at common law, either in this country or in England; and the mistaken doctrine seems to have originated, either in the inadvertent confounding of what might, in the absence of rebutting evidence, be good presumptive evidence of a marriage, with marriage itself; or from the fact that such a contract *per verba de futuro*, followed by cohabitation, was one of which the canon law, as administered by ecclesiastical courts in England, until restrained by statute, would enforce the specific performance."[2]

§ 259. **Nature of the Presumption from Copula.** — The rule that words of future promise may be converted by copula into present marriage, being thus one of evidence merely,[3] may probably be sometimes, or always, controlled by proof showing marriage not to be intended. Therefore the doctrine seems to

[1] And see post, § 261.

[2] Duncan *v.* Duncan, 10 Ohio State, 181, 183, 184.

[3] Ante, § 253–253 *b*. But see post, § 261. And see Dumaresly *v.* Fishly, 3 A. K. Mar. 368; Ferg. Consist. Law, Rep. 118, 129, 130; Pennycook *v.* Grinton, ib. 95.

be, that, if parties after contracting *de futuro* have carnal intercourse under the express agreement not to create thereby a marriage, it will not so operate.[1] Yet Swinburne and Ayliffe both assert, that, though the persons betrothed should protest before copula their intention not to convert the espousals into matrimony, "yet this protestation is overthrown by the fact following; for by lying together they are presumed to have swerved from their former unhonest protestation," and so a marriage, in spite of the protestation, is created.[2] But this statement of the law appears only to hold the rule of presumptive innocence with a strong hand, and not absolutely to deny that it may be overcome. And the better view appears to be the one expressed in a dictum of Lord Campbell, who says: "If the woman, in surrendering her person, is conscious that she is committing an act of fornication, instead of consummating her marriage, the copula cannot be connected with any previous promise that has been made, and marriage is not thereby constituted;"[3] leaving the intent a subject of inquiry, and the presumption of law, which favors innocence, open to be rebutted by evidence in each particular case. We have seen that this doctrine is at present established in Scotland by solemn adjudication.[4]

§ 260. **Continued — Presumption rebutted by Presumption —** We shall presently see[5] that a mere courtship, which falls short of an agreement to marry, followed by copula, does not constitute marriage. And in a Scotch case, which assumed rather this character than the ordinary one of a mutual engagement *de futuro* with copula following, — if we may trust the rather indistinct report we have of it, — the presumption of present consent, which under even these circumstances might perhaps arise from the copula, was deemed to be overcome by a counter presumption. For when a countess, after, perhaps, engaging to marry her footman, or at least after his courtship and matrimonial proposals, yielded to his embraces, the court and counsel agreed, that marriage should not be inferred; the disparity

[1] 2 Hag. Con. App. 41, 77; 1 Fras. Dom. Rel. 216; More's Notes to Stair, 13.

[2] Swinb. Spousals, 224; Ayl. Parer. 250.

[3] Reg. *v.* Millis, 10 Cl. & F. 534, 782.

[4] Ante, § 253 *b*.

[5] Post, § 265.

of rank and circumstances rendering probable her allegation, that she had chosen to indulge a licentious passion, rather than degrade herself from her high station by espousing her menial servant.[1] On a like principle, where no promise is proved, a marriage between a free white woman and her negro slave will not be inferred from cohabitation.[2]

§ 261. **Copula before Promise — Both before and after — Promise discharged.** — But though the parties were living in fornication before the promise of future marriage, still the general rule ordinarily prevails, and marriage is constituted by their subsequent intercourse.[3] The presumption is, that the woman had reformed, and refused to continue the connection, unless put on an honorable footing.[4] At the same time we have the Ohio case, mentioned just back,[5] in which the facts showed an unwillingness on the part of the man to marry the woman; and perhaps, where such unwillingness appears palpable, the marriage should not be held to be constituted. Where a promise to marry follows copula, and no copula follows the promise, a marriage is not constituted. And it is the same, it seems, where the promise has been discharged before the copula takes place,[6] — which is also the rule of the canon law. Yet, in Hoggan *v.* Cragie, Lord Brougham intimated, as the sounder view, that the copula would both revive the promise and give it the character of a present consent.[7]

[1] Forbes *v.* Strathmore, Ferg. Consist. Law, Rep. 115. The pursuer, however, proceeded to prove a marriage by habit and repute, and the lady abandoned the defence. Mr. Fergusson says: "Other cases, both of earlier and of later date, will likewise be found to support the opinion, that the inference from the facts of an established promise *subsequente copula*, amounts to no more than a *præsumptio juris, ex eo quod plerumque fit*, and is not, in technical language, a *præsumptio juris et de jure*, in itself absolutely conclusive, and not to be redargued or disproved. . . . The proposal or promise of the male party to marry, and the surrender of her person by the female, does indeed afford a presumption of mutual consent, so strong, that, if not overcome by opposite and superior evidence, it may be always conclusive." p. 118.

[2] Armstrong *v.* Hodges, 2 B. Monr. 69.

[3] Sim *v.* Miles, 8 Scotch Sess. Cas. 89, 97.

[4] 1 Fras. Dom. Rel. 195.

[5] Ante, § 258.

[6] Swinb. Spousals, 2d ed. 226.

[7] 1 Fras. Dom. Rel. 196; Hoggan *v.* Cragie, Maclean & Rob. 942, 974; Lord Campbell, in Reg. *v.* Millis, 10 Cl. & F. 534, 782. Ayliffe holds that a marriage is not constituted in such a case. Ayl. Parer. 250; ante, § 252. In Turpin *v.* The Public Administrator, 2 Bradf. 424, the surrogate observed: "When parties are living in a meretricious state, a promise to marry on some future condition does not effect a mar-

§ 262. **Prior Formal Marriage to intervene.** — In order to satisfy the legal mind, whether, in this class of cases, a marriage shall be held to be constituted where evidently one of the parties to the act of carnal intercourse, or both, understood, that, before the marriage should be deemed to have taken place, there should be a public solemnization of it, we must determine the previous question, or, rather, the foundation question, whether the law puts the presumption of innocence under the circumstances of cohabitation involved in this marriage *per verba de futuro cum copula*, among its conclusive presumptions, — among, in other words, its *estoppels*, — or only holds it to be a strong presumption of fact in the nature of evidence. And upon this question the most which can be said in favor of the validity of such a marriage is, that judicial opinion is perhaps divided on the nature of the presumption, though certainly the current of modern doctrine is, that it is not conclusive. And, as we have seen,[1] the Alabama court has held that marriage is not created in these circumstances.

§ 263. **Copula the Condition of Promise — Seduction under Promise to marry — Other Conditional Promises.** — When the copula is the condition of the promise, as where a man says to a woman, "I will marry you in six weeks if you will sleep with me to-night," a marriage is not constituted.[2] And where there is a conditional promise of future marriage, followed by copula; if the condition is of a nature not to be purified until after the copula is had, the law will not found on the transaction a marriage; but, if the condition could be purified before, or at the time, the law will presume it was so purified, and will infer a present mutual consent from the carnal act.[3] An illustration of a condition not purified by copula, is where the man tells the woman he will marry her, if she becomes with child, or a child is born, from the connection. Here the promise in terms rests on an event to happen after the copula, which excludes the possibility of a present consent.[4] On the

riage by mere continuation of that connection." See, also, Yelverton *v.* Longworth, 2 Scotch Sess. Cas. 3d ser. H. L. 49, 4 Macq. 745.

[1] Ante, § 249.

[2] Lords Brougham and Campbell, in Reg. *v.* Millis, 10 Cl. & F. 534, 626, 782; ante, § 256, 257.

[3] 1 Fras. Dom. Rel. 193.

[4] Stewart *v.* Menzies, 2 Rob. App. Cas. 547, 8 Cl. & F. 309; Kennedy *v.* Macdowall, Ferg. Consist. Law, Rep. 163, App. 90; Swinb. Spousals, 148.

other hand, if a man has agreed to marry a woman when he can do so with comfort, or when she finds caution that she is free from debt, or worth a sum of money named; the condition in its nature may at any time be purified, and, if copula follows such a promise, the law will presume the parties married.[1]

§ 264. **Enforced Betrothal.** — "Albeit," says Swinburne, "the woman were betrothed against her will, yet, if she suffer herself to be known by him to whom she was espoused, she is presumed to have consented unto him as unto her husband, whereby the spousals are made matrimony. Albeit the woman be uncertain; as, if a man do swear to three sisters that he will marry one of them; for by lying with one of them those spousals become matrimony."[2]

§ 265. **Courtship short of Marriage Engagement.** — We should, however, notice, that a mere courtship, followed by copula, is not marriage.[3] The marriage promise must be absolute and mutual; though, like every thing else, it may be proved by circumstantial as well as by direct evidence.[4] There has been some discussion, whether the copula may be relied on as one of the circumstances in proof of the promise; and the better opinion is, that it may be. The promise must have a complete existence distinct from the copula;[5] but the parties living together may have some effect, such as to "explain ambiguous words."[6]

VI. *Consent by Habit and Repute.*

§ 266. **General Doctrine.** — It is sufficiently plain from the foregoing discussions, that the law knows of but one kind of consent to actual marriage. And as the consent *per verba de futuro cum copula* differs in no essential particular from consent *per verba de præsenti*, and the expression merely points to a difference in the form of the proofs, so it is with the consent now to be considered. But, as mere matter of convenience in the form of discussing the subject, some lawyers, particularly

[1] 1 Fras. Dom. Rel. 194.

[2] Swinb. Spousals, 2d ed. 225.

[3] Monteith *v.* Robb, 6 Scotch Sess. Cas. N. S. 934.

[4] Hoggan *v.* Craigie, Maclean & Rob. 942; Honyman *v.* Campbell, 8 Scotch Sess. Cas. 1039, 5 Wilson & Shaw, 92; Morrison *v.* Dobson, 8 Scotch Sess. Cas. 3d ser. 347.

[5] Harvie *v.* Inglis, 15 Scotch Sess. Cas. 964.

[6] Graham's Case, 2 Lewin, 97; Campbell *v.* Honyman, 8 Scotch Sess. Cas. 1039, 1050, 5 Wilson & Shaw, 92.

the Scotch, speak of a third kind of informal marriage, which they term marriage by habit and repute. It is established in proof, rather than constituted, by the parties cohabiting as husband and wife, and being accepted in society and reputed as such.[1] In a late case before the House of Lords, Lord Westbury explained the Scotch law on this sort of marriage as follows: "If I were to express what I collect from the different opinions on the subject, I should rather be inclined to express the rule in the following language: that cohabitation as husband and wife is a manifestation of the parties having consented to contract that relation *inter se*. It is a holding forth to the world, by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and, when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise, and attend upon the cohabitation. The parties are holden and reputed to be husband and wife."[2] Perhaps the use of the term "habit and repute" in the Scotch law, to convey the idea of a doctrine which pervades our own law as well, originated in an ancient statute, providing, that widows, who were holden and reputed wives of the defunct, should have their terce aye and till it should be clearly discerned that they were not lawful wives.[3] Statutes of the like sort exist in a considerable number of our own States.[4] For example, a statute in Massachusetts provides, that, in "all cases where it shall become necessary to prove the fact of marriage, in any hearing before any court in this Commonwealth," "evidence of admission of said fact by the party against whom the process is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence, from which said fact

[1] 1 Fras. Dom. Rel. 113; Ferg. Consist. Law, 116. As to this kind of marriage, the court in one case observed: "They [the witnesses] never heard this man call her his wife, or any thing which could lead them to hold he meant to call her his wife. In no case where this language was not used has the marriage been sustained." Thomas *v.* Gordon, 7 Scotch Sess. Cas. 872.

[2] Campbell *v.* Campbell, Law Rep. 1 H. L. Sc. 182, 211. And see p. 200.

[3] 1 Fras. Dom. Rel. 202.

[4] Post, § 543–545; Bishop Stat. Crimes, § 609.

may be inferred, shall be received as competent evidence for consideration, whether the marriage to be proved was contracted in this Commonwealth or elsewhere."[1] But obviously the rule alike of the Scotch law, and of the Massachusetts statute, pertains merely to the evidence.[2] There seems to be no good reason, therefore, either of a philosophical or a practical nature, for distinguishing between the different kinds of consent, as indicated by the different modes of proof.

§ 266 *a*. **Doctrine applied to Formal Marriages.** — And when we come to consider the evidence of marriage, in subsequent parts of this volume, we shall see, that the doctrine of consent by habit and repute is applied to all sorts of marriages, even formal ones, in England and those States of our Union where ceremonies are essential to the validity of marriage, for the purpose of establishing a *prima facie* case, at least in most civil actions.[3] In Scotland, habit and repute furnish only *prima facie* evidence,[4] therefore the general doctrine may be said to pervade the entire system of our jurisprudence the same as it does the Scotch law.

VII. *Effect of this Impediment of Imperfect Consent.*

§ 267. **Void, not Voidable.** — It is obvious that the want of consent considered in this chapter renders the supposed marriage a mere nullity.[5] It may often be desirable, and sometimes of the highest practical importance, for the facts to be inquired into, and a sentence of nullity pronounced in a suit instituted for the purpose. Yet no legal necessity requires this; but the invalidity of the marriage may be shown by any party, in any judicial proceeding, in which the question is either directly or indirectly involved.[6]

[1] Stat. 1840, c. 84; 1841, c. 20, re-enacted, Gen. Stats. c. 106, § 22; Commonwealth *v.* Morris, 1 Cush. 391.

[2] 1 Fras. Dom. Rel. 203. It is by some supposed that this rule in the Scotch law is derived from the canon law. Ib. 202.

[3] Post, § 434–449.

[4] Campbell *v.* Campbell, Law Rep. 1 H. L. Sc. 182.

[5] Campbell *v.* Campbell, Law Rep. 1 H. L. Sc. 182.

[6] Ante, § 215 and sections there referred to.

CHAPTER XIII.

FORMAL SOLEMNIZATION OF THE MARRIAGE.

§ 268. **Scope of the Chapter — How divided.** — In the last chapter was discussed the consent necessary to constitute marriage, considered irrespective of any particular forms of solemnization. And we there saw, that, whether such forms are to be added to the consent therein treated of or not, still the consent itself must always be given. In the present chapter we are to inquire, whether the common law makes any forms necessary; and, assuming it does, what forms; and to consider briefly whatever need be considered concerning the statutes of the several States on the subject. We shall divide the matter as follows: I. Whether any and what Forms are required by the Common Law; II. How Statutes concerning the Forms are to be interpreted; III. Some Particular Provisions of Statutory Law.

I. *Whether any and what Forms are required by the Common Law.*

§ 269. **Council of Trent — Prior Marriage Law in Europe — England, &c.** — Previous to the Council of Trent, the authority of which was never acknowledged in England,[1] nothing more than mere consent was, by the general matrimonial law of Christian Europe, deemed requisite to the validity of a marriage.[2] But whether the same rule prevailed in England, Ireland, and Scotland, is a question which has greatly agitated the tribunals of those countries, and created some difference of opinion in the American courts.

[1] Poynter Mar. & Div. 13.

[2] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 4 Eng. Ec. 485.

§ 270. **English and American Law — Question of Formal Solemnization stated.** — The question is simply, whether, to constitute a complete and valid marriage at the common law, the mutual consent of the parties must be given in the presence of a person in holy orders; namely, a bishop, priest, or deacon, episcopally ordained.[1] It is apparently conceded, that the marriage need not be *in facie ecclesiæ*, further than the presence of such a person is concerned; but that it is just as well celebrated in a private room as in a church. Neither is it necessary for the person in holy orders to take any active part in the marriage;[2] he may even refuse, and still it is valid. Perhaps, according to the opinion of those who hold this presence to be essential, he must be the parish priest of the parties. The presence of a dissenting clergyman is, according to this opinion, of no avail; he must be episcopally ordained; that is, a Roman Catholic clergyman, previously to the Reformation; after the Reformation, a clergyman of the Church of England, though even then, aside from any statutory prohibition, a Roman Catholic clergyman would suffice, his ordination being still regarded as valid. No compliance with forms, either in the church or elsewhere, is, according to this opinion, of any avail, when the proper clerical person is not present.[3]

§ 271. **Why the Question in Doubt.** — It may seem a little strange at first, that this question should be left in doubt. But when we consider, that anciently the people were almost entirely under the control of the priesthood; that always, unless according to the opinion of some we except the very early ages of Christianity, religious ceremonies were regarded as highly appropriate to attend the nuptials, and so a marriage without them was the rarest of all occurrences; that, also, when a marriage did take place without the clerical presence, either party to it could compel the other to solemnize it *in facie eccle-*

[1] By statute in England, the only orders allowed after the Reformation were bishops, priests, and deacons. Besides these, the Romish Church reckoned five other orders; namely, sub-deacons, acolyths, exorcists, readers, and ostiaries. Rogers Ec. Law, 2d ed. 668.

[2] Upon this one point, however, doubt is cast by the recent case of Beamish *v.* Beamish, 9 H. L. Cas. 274. And see post, § 289.

[3] Reg. *v.* Millis, 10 Cl. & F. 534.

sicæ, — we perceive this question could seldom arise, so therefore the doubt concerning it is really not matter of marvel.

§ 272. **What is agreed on all Sides.** — All parties to this controversy concur, that the mere present matrimonial consent, given without clerical intervention, produced a legal result quite different from an unconsummated promise of future marriage. It created a lasting obligation, which the persons entering into it could neither singly nor mutually dissolve. If they lived together after the manner of husband and wife, they did not thereby commit fornication. Neither one of them could marry another person; and, if either did, though the marriage was celebrated in the face of the church, with all due observance of forms, it was voidable; that is, liable to be dissolved, and held void *ab initio*, by a proceeding in the ecclesiastical court; such dissolution being termed a divorce *causa præcontractus*;[1] while a marriage, during the life of a former husband or wife with whom there had been a formal celebration of the marriage, was void *per se* without sentence. This marriage without clerical intervention also entitled either party, as just said, to compel the other, by a suit in the spiritual court, into a public solemnization in the face of the church. If either had sexual intercourse with another person, he might be proceeded against for adultery. The contract was considered to be of the essence of matrimony, and was styled in the ecclesiastical law *verum matrimonium*, and sometimes *ipsum matrimonium*.[2]

[1] Ante, 112 and note, 256.

[2] Reg. *v.* Millis, 10 Cl. & F. 534, 624, 626, 654, 655, 703, 707, 832, 856, 858. Some slight doubt was expressed in this case upon one or two of the above points. Thus the solicitor-general put it in argument, that a marriage against the impediment of precontract was void, not voidable, p. 608. And Lord Campbell was of opinion, that the precontract which could be enforced by a suit in the ecclesiastical court, and which rendered a subsequent marriage in disregard of it voidable, was an executory agreement to marry, not the promise *per verba de præsenti*, p. 763, 784. Contra, Ld. Denman, p. 815. In accordance with this opinion of Lord Campbell, is that expressed by Woodbury, J., in Londonderry *v.* Chester, 2 N. H. 268. On this point, I presume the last reported English case to be Baxtar *v.* Buckley, 1 Lee, 42, 5 Eng. Ec. 301. It passed to judgment the year before the date of the first English marriage act, which put an end to these suits. There, the contract was *per verba de præsenti* (not in writing) and the parties were minors. The sentence of the court was, that "Mr. Buckley," says the report, "solemnize marriage in the church with Susanna

§ 273. **View of this Common Ground — What is disputed.** — What we have thus far said is common ground, conceded on all sides in this controversy. And the reader cannot fail to reflect, that, if this contract was not marriage, it was surely a very sublimated kind of Christian concubinage. We now come to the disputed territory. On the one hand it is contended, that, not only were parties refusing to have their marriages publicly celebrated liable to ecclesiastical censure, and to a suit to enforce the public solemnization, but also that substantially the rights of matrimony, such as the legitimacy of children, and, in later times, dower and curtesy, flowed from these connections, which, in other words, were complete marriage. On the other hand, it is contended, that the children were illegitimate, though the cohabitation of the parents was not adulterous; that neither could the woman have dower, nor the man curtesy; and that, although a public marriage, solemnized afterward between one of the parties and a third person, was voidable in the ecclesiastical court, and the cohabitation under it punishable there as adulterous, yet it would not subject them to an indictment for polygamy; consequently (such is the inference), that the contract was not marriage.[1]

§ 274. **Adjudications as to Scotland.** — In Scotland, this question was earliest put to rest. The leading Scotch cases are McAdam *v.* Walker, which, beginning in the year 1805, and travelling through the Scotch courts, was carried to the House of Lords, and there decided in 1813;[2] and Dalrymple *v.* Dalrymple, which was a suit brought in the Consistory Court of London to affirm a Scotch clandestine marriage, decided there by Lord Stowell in 1811, and appealed to the Court of Arches, and thence to the High Court of Delegates, and decided by the latter in the year 1814.[3] In each of these cases, the marriage was without clerical intervention; and in each, in every stage

Baxtar within sixty days after he shall be served with a monition for that purpose."

[1] Reg. *v.* Millis, as cited ante, § 270–272.

[2] McAdam *v.* Walker, 1 Dow, 148. And see 2 Hag. Con. 97, 4 Eng. Ec. 504.

[3] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 4 Eng. Ec. 485, and note at the end of the case.

of it, was held to be good. Lord Stowell's opinion in the Dalrymple suit has ever been esteemed a production of matchless beauty and learning, quite unsurpassed in forensic discussion. Still, the result has not been universally approved, even by Scotch lawyers; but all admit, that the question, so far as Scotland is concerned, is finally adjudicated, no more to be stirred.[1]

§ 275. **England — Ireland — Reg. *v.* Millis.** — The first English marriage act, commonly called Lord Hardwicke's,[2] settled the question for England in respect to future marriages, but left it open for the rest of the British dominions. The Dalrymple case, however, was generally understood as determining it for those other portions, in the same way as for Scotland; until the case of The Queen *v.* Millis came, in 1844, before the House of Lords, on an appeal from Ireland. The facts of this case are, that the defendant, Millis, being a member of the established church, was married, in Ireland, to a woman who was either a member of the same church or a dissenter, by a Presbyterian minister, according to the form usual with Presbyterian dissenters; and, under the marriage, the parties cohabited for two years as husband and wife. Afterward, while this woman was living, he married in England another woman, in a form about which no dispute arose. He was indicted in Ireland for polygamy. The first marriage contained all the ingredients essential in a contract *per verba de præsenti*. Was it sufficient to sustain the indictment? The judges of Ireland differed, being about equally divided in opinion; though, in form, that the case might be taken up, they united in giving judgment against the crown. The English Lords, on the question coming before them, consulted the common-law judges of England; and the latter unanimously advised, that the first marriage was, as a foundation for the indictment, invalid. But the Lords, who gave judgment, were equally divided; Brougham, Denman, and Campbell being in favor of sustaining the first marriage; the Lord Chancellor (Lyndhurst), Cottenham, and Abinger being of the opposite opinion. So the rule *Semper præsumitur pro*

[1] Fras. Dom. Rel. 87 et seq.

[2] 26 Geo. 2, c. 33, A. D. 1753.

negante applied, and judgment was formally rendered for the defendant.[1]

§ 276. **Observations on Reg. *v.* Millis — The Sort of Learning required for the Discussion.** — The question, in the House of Lords, was discussed most elaborately by counsel; also by Lord Chief Justice Tindal, who pronounced the opinion of the judges; and by the Lords above named, who gave opinions *seriatim*. It was likewise thoroughly examined in the court below. The report of the case before the Lords fills 374 of the ample pages of Clark & Finnelly's Reports, and is a mine of learning, though perhaps not altogether of wisdom, on the subject. The difficulty was, that the greater part of those who were required to discuss the question were deficient in the particular collateral knowledge essential to the formation of an intelligent judgment upon what was found in the books. Or, to state the exact truth, the result hinged upon the understanding which the court should form of some things connected with the doctrines and practice of the ecclesiastical courts; no ecclesiastical judge was present to help the tribunal, which was swayed by the opinions of the common-law judges; and those judges, although learned in their own department, knew almost nothing of ecclesiastical law, nor was time allowed them to supply the deficiency by study. Lord Chief Justice Tindal complained of the want of time to give to the subject the attention desirable; and throughout his opinion appeared conscious of what was true, that he and his associates, driven to the work without due preparation, did not constitute the advisory tribunal to which this question ought to have been submitted. From these facts, coupled with the fact that the ecclesiastical judges, whose pursuits lead them into the collateral knowledge most important for the solution of this class of questions, were, both before and afterward, of opinion opposite to what was arrived at by the common-law judges in this case, we may infer, that further study and reflection would have led the common-law judges also into sustaining, by their opinion, this marriage.

§ 277. **Continued.** — The opinions alike of judges and lords

[1] Reg. *v.* Millis, 10 Cl. & F. 534.

were apparently based upon the view taken of the common law of England. Yet there were several statutes relating to Ireland, more or less considered in the arguments; one of which, in particular, had great weight with the Lord Chancellor, and it may have turned the scale. It was Stat. 58 Geo. 3, c. 81, which provided, that thereafter there should no "suit or proceeding be had in any ecclesiastical court in Ireland, in order to compel a celebration of any marriage *in facie ecclesiæ*, by reason of any contract of matrimony whatever, whether *per verba de præsenti* or *per verba de futuro*." The Lord Chancellor deemed, that the effect of this statute had been to change entirely the character of the contract *per verba de præsenti*.[1] Lord Chief Justice Tindal plainly did not put his opinion upon this ground; and, though he expressly said the other judges were not answerable for his reasons, yet he employed language inconsistent with the idea of their opinions resting upon any other basis than the English common law as unaffected by marriage acts.

§ 277 *a*. **Continued — Some General Views.** — It does not seem to the writer advisable to discuss over again this question in these pages. There are one or two points, however, so liable to be overlooked that it becomes important to direct the reader's attention to them. The leading one is the doctrine relating to marriage laws, stated further on,[2] that all regulations concerning the forms of marriage, whether made by ecclesiastical councils or by legislative act, are directory only, not affecting the validity of a marriage had in disregard of them, unless they contain an express clause of nullity. This consideration, which seems not to have been in the minds of the common-law judges in advising in the case of The Queen *v.* Millis, disposes of a large proportion of the arguments against the marriage without clerical intervention.[3] There were, in former

[1] Page 871 of the report of the case of Reg. *v.* Millis, which commences 10 Cl. & F. 534. And see also the opinion of Lord Cottenham, p. 890. The same was also held by Mr. Justice Crompton, in the Court below. See p. 552, and Dix's Rep. 254.

[2] Post, § 283.

[3] The doctrine of the "King's Ecclesiastical Law" was undoubtedly well stated (ante, § 54); but the effect of the doctrine could only be to weaken somewhat one of Lord Stowell's minor arguments employed in the Dalrymple case. Whatever conclusion the reader may arrive at, he will certainly sympathize with Lord Cottenham, who says, that, in the course of a long professional

times, numerous canons, and the like, making it an offence against the church for people to marry without the presence of the priest, but these were never construed to render the marriage in violation of them void. And we shall see, in the proper place,[1] that this is an interpretation differing from what is more frequently applied by the common-law courts to statutes relating to other subjects.

§ 277 *b*. **Continued — Dower, &c.** — Again, in the common-law courts, there could in the early times be no dower unless the marriage was celebrated by a priest. To illustrate this and some other things, let us lay before us a late edition of Britton, by Nichols, with the editor's translation and some collected notes. The editor, on a careful examination, puts the date of this legal classic at about 1291 or 1292; namely, 20 Edw. I. The reader may like to compare this date with some which have been previously given.[2] It is well known that the common-law right of dower originated in a custom for the husband, or some other person, voluntarily to assign dower to the woman at the celebration of the nuptials "at the church door," as the phrase was. Consequently Britton says: "Dower is not assigned in all places nor at all times, but at certain, to wit, at the commencement of the contract and at the door of the church only, with the solemnity of witnesses, and not in private. For as secret marriages, performed in private, are prejudicial to heirs with reference to the succession, so are they prejudicial to wives with respect to the recovery of their dowers. The nature of dower, then, is such, that, where espousals are solemnized at the church in the presence of the people, in such case and not otherwise dower may be demanded."[3] But what is the meaning of the phrase "at the door of the church"? This is explained in a note by a contemporaneous lawyer and judge, appended to this very passage, and it has been preserved by the editor. Says the annotator: "Every contract of marriage, at which there is present a parish priest and his clerk, is at the church door, and sufficiently solemn; for it is *in facie ecclesiæ*." Now, bearing this

life, he has not met with a question so embarrassing. p. 873.

[1] Post, § 286.

[2] Ante, § 51, 54.

[3] Britton, 5, 1, 2, p. 236 of Vol. 2, Nich. ed.

explanation in mind, let us turn to another passage in this ancient author. Speaking of the recovery of dower by action, he says: "Again, the tenant may say, that, although she [the widow] was lawful wife, yet she ought not to have dower, because she was never solemnly married at the church door, and consequently dower was never established upon her there. And if this be verified, she shall not recover any dower on account of the words of the writ 'at the church door.'"[1] A little further on we read: "But now it may be asked, whether, if a man kept a mistress in concubinage, and begot a child by her, and afterwards secretly married her elsewhere than at the church door, and after such marriage had another child by her, and then publicly married her at the church door, and there endowed her, and after that had a third child by her, which of these children would be admissible to the succession of the inheritance of the father, and by reason of which of them the mother shall be entitled to dower after the decease of the father. The answer in such case is, that the middle son ought to be admitted to the succession of the inheritance of the father, and shall be accounted legitimate in respect of his birth although the marriage was secret, provided he can aver that he was born within wedlock, whether the espousals were publicly or privately performed. And yet the mother shall not have dower by reason of that child, but she shall have it by reason of the third son, and of the solemn espousals wherein she was endowed at the church door. Hence it appears, and true it is, that sometimes the mother shall not have dower, although the son may be admissible to the succession of the inheritance of his father, and that no right ever accrues to any woman to demand dower, unless it was established to her at the church door, and this, whether in a time of interdict or not."[2] Seeing, then, that a marriage performed by the intervention of the priest was not deemed to have been secret, but to have been celebrated at the "church door," or *in facie ecclesiæ*, we have here a clear exposition of the better common-law doctrine. Now, if we take out of our view the old ecclesiastical inhibitions of marriage celebrated otherwise than "at the church door," and

[1] Britton, p. 262 of Vol. 2, Nich. ed. [2] Ib. p. 266.

the old common-law cases which held that there could be no dower when the marriage was not "at the church door," we shall find but little of even apparent authority left to sustain the doctrine, that any thing connected with the "church door" was an essential element in marriage; leaving unquestioned what Britton tells us was the law of his day, that marriage without clerical intervention is good, even though celebrated in private.

§ 278. **Reg. *v.* Millis, continued — Irish Law — Colonial.** — In consequence of the divided opinion under which the judgment in The Queen *v.* Millis was pronounced, and the circumstances of haste and pressure under which the law of the case was examined by the advising common-law judges, it, of course, is not entitled to any particular weight in the United States, even if there were no more substantial objections against it. Yet in England, after some doubt had been raised, it was held to be binding on the courts, although rendered by a court equally divided in opinion.[1] Yet if it settles the law for Ireland, the author does not see how it should be accepted as settling the law for the colonies, any more than the prior contrary decisions rendered by British courts upon the Scotch law[2] had settled the question for Ireland. And in the Consistory Court of London, in the year 1847, on a divorce suit for adultery, where the marriage had been contracted *per verba de præsenti* before a Presbyterian clergyman in New South Wales, Dr. Lushington held it to be a sufficient foundation for the divorce; and employed, in announcing this decision, the following language: "When I consider how much that question was discussed in the celebrated case of The Queen *v.* Millis, I am justified in saying, that nothing fell from any one of the law lords in the House of Lords (I am not alluding to the opinions expressed by the common-law judges) which in any way intimated that such a marriage would not be sufficient to enable this court to proceed to a separation *a mensâ et thoro*. I am not disposed to carry the decision in that case one *iota*

[1] Attorney-General *v.* Dean and Canons of Windsor, 8 H. L. Cas. 369, 392, 393. And see Catherwood *v.* Caslon, 13 M. & W. 261, 8 Jur. 1076; Beamish *v.* Beamish, 1 Jur. N. S. part II. 455 (also reprinted in a note to § 173, 2d and 3d eds. of this work), 9 H. L. Cas. 274.

[2] Ante, § 274.

further than it went, for two reasons: first, as the law lords were divided, it was only in consequence of the form in which that case came before them, there could be considered to be a judgment at all; in the second place, were I to hold the presence of a priest in the orders of the Church of England to be necessary, I should be going the length of depriving thousands of couples, married in the colonies and the East Indies (where till of late there were no chaplains), of the right to resort to this court for such redress as it can give in cases of cruelty or adultery. Until I am controlled by a superior authority, for no further examination of the question will induce me to change *my* opinion, most unquestionably I shall hold in this, and all other similar cases, that, where there has been a fact of *consent* between two parties to become man and wife, such is a sufficient marriage to enable me to pronounce, when necessary, a decree of separation." [1] The court also held, that this marriage could not be decreed void in a suit for nullity.[2] In a more recent case, the Court of Queen's Bench, in our neighboring province of Upper Canada, intimated an opinion adverse to receiving the decision in The Queen *v.* Millis as sufficient to establish the law of marriage in accordance with the doctrine maintained by the common-law judges.[3]

§ 279. **How in our States.** — The doctrine, that the intervention of a person in holy orders is essential to marriage, has found small support in this country. Such intervention has been held to be unnecessary at the common law, by the courts of New York,[4] New Jersey,[5] Pennsylvania,[6] Kentucky [7] (but the law was afterward changed by statute [8]), Vermont substan-

[1] Catterall *v.* Catterall, 1 Robertson, 580.

[2] Catterall *v.* Sweetman, 1 Robertson, 304.

[3] Breakey *v.* Breakey, 2 U. C. Q. B. 349.

[4] Fenton *v.* Reed, 4 Johns. 52; Starr *v.* Peck, 1 Hill, N. Y. 270; Rose *v.* Clark, 8 Paige, 574; Clayton *v.* Wardell, 4 Comst. 230; Cunningham *v.* Burdell, 4 Bradf. 343; Grotgen *v.* Grotgen, 3 Bradf. 373; Hayes *v.* People, 25 N. Y. 390; Bissell *v.* Bissell, 55 Barb. 325, 7 Abb. Pr. N. S. 16; Van Tuyl *v.* Van Tuyl, 57 Barb. 235, 8 Abb. Pr. N. S. 5; ante, § 255 et seq.

[5] Pearson *v.* Howey, 6 Halst. 12, 18, 20, where Ford, J., so held, — the other judges being silent upon the point.

[6] Hantz *v.* Sealey, 6 Binn. 405; Commonwealth *v.* Stump, 3 Smith, Pa. 132.

[7] Dumaresly *v.* Fishly, 8 A. K. Mar. 368.

[8] Estill *v.* Rogers, 1 Bush, 62; Stewart *v.* Munchandler, 2 Bush, 278.

tially,[1] of Ohio,[2] Tennessee,[3] Alabama,[4] possibly New Hampshire,[5] of Maryland,[6] South Carolina,[7] and California.[8] The same has been held in Louisiana, which State derived its common law from Spain, the Council of Trent never having been deemed binding in the colony, though received in the mother country.[9] And never probably has a contrary judgment been deliberately pronounced by the tribunals of any State of our Union. It was, however, strongly expressed by the Supreme Court of North Carolina, that the common law of that State recognized no marriages otherwise than according to the statutes,[10] — "as to which," the court observed in a subsequent case, "we express no opinion."[11] And in Massachusetts a distinguished judge observed: "When our ancestors left England, and ever since, it is well known that a lawful marriage there must be celebrated before a clergyman in orders," — language showing conclusively that he had not bestowed upon the subject any degree of his usual research.[12] In Maine this

[1] Newbury *v.* Brunswick, 2 Vt. 151. See Northfield *v.* Plymouth, 20 Vt. 582; The State *v.* Rood, 12 Vt. 396.

[2] Carmichael *v.* The State, 12 Ohio State, 553.

[3] Bashaw *v.* The State, 1 Yerg. 177; Grisham *v.* The State, 2 Yerg. 589.

[4] The State *v.* Murphy, 6 Ala. 765; 2 West. Law Jour. 192. Perhaps the question is not fully settled in this State. Robertson *v.* The State, 42 Ala. 509; Campbell *v.* Gullatt, 43 Ala. 57.

[5] Londonderry *v.* Chester, 2 N. H. 268, 277. And see Keyes *v.* Keyes, 2 Fost. N. H. 553. But compare these with Dunbarton *v.* Franklin, 19 N. H. 257.

[6] Cheseldine *v.* Brewer, 1 Har. & McH. 152. This case is, to appearance, overruled, and the doctrine held the other way, in the subsequent case of Denison *v.* Denison, 35 Md. 361, as to which see the next section.

[7] 10 McCord's Stat. 357, Ed. note; S. C. Law Jour. 384.

[8] Graham *v.* Bennet, 2 Cal. 503. Consult, however, Holmes *v.* Holmes, 1 Abb. U. S. 525.

[9] Patton *v.* Philadelphia, 1 La. An. 98; Holmes *v.* Holmes, 6 La. 463; Succession of Prevost, 4 La. An. 347, 349; Hallett *v.* Collins, 10 How. U. S. 174; ante, § 269.

[10] The State *v.* Samuel, 2 Dev. & Bat. 177. The question in this case was, whether marriages by cohabitation among slaves were valid, and they were held not to be so. But the decision rested as much on the legal incapacity of slaves to marry — see ante, § 154 et seq. — as on the view taken of the common law of the State.

[11] The State *v.* Ta-cha-na-tah, 64 N. C. 614. See Cooke *v.* Cooke, Phillips, 583.

[12] Milford *v.* Worcester, 7 Mass. 48, 53. See also 2 Dane Abr. 291; 9 ib. 161; post, § 285. Mr. Gray, in a note to Oliver *v.* Sale, Quincy, 29, has referred to an old Massachusetts case which seems to shed much light on this question. His words are: "In 1758, it was adjudged by the Superior Court of Judicature, that a child of a female slave 'never married according to any of the forms prescribed by the laws of this land,' by another slave, who 'had kept her company with her master's consent,' was not a bastard.

question is still undecided ;[1] though there the court seems to have taken it for granted that the statutory forms must be followed.[2] The question coming before the Supreme Court of the United States, the bench was equally divided.[3] Chancellor Kent, Judge Reeve, and Professor Greenleaf, in their text-books, have considered clerical intervention to be unnecessary at the common law,[4] and this may well be deemed the American doctrine.[5] The doctrine otherwise expressed is, that the marriage by mere consent, as explained in our last chapter, is good throughout the United States, except in some States where local statutes have provided otherwise.

§ 279 *a*. **Continued — Maryland.** — There is, however, as observed in a note to the last section, a Maryland case which, at the first impression, might seem to be a decision in favor of the doctrine of the necessity of clerical intervention. In this case the court, overruling a former decision not deemed to be of binding force,[6] held, that the unwritten law of the State required some official or religious ceremony to make the marriage valid. "We think we are safe in saying," said Alvey, J., in delivering the opinion of the court, "that there never has been a time in the history of the State, whether before its independence of Great Britain or since, when some ceremony or celebration was not deemed necessary to a valid marriage. In the early days of the province, it was not absolutely necessary that a minister of religion should officiate, — a judge or magistrate could perform the ceremony, — but still, in all

Referring to Flora's Case, Rec. 1758, fol. 296. We have already seen, ante, § 155, that negro slaves could contract valid marriages in Massachusetts, the same, precisely, as free white people; and it is difficult to assign any meaning to this Flora's Case unless it is, that all marriages were by the court deemed to be good, though there was no formal solemnization, nor the presence of a priest in holy orders, or of any official person.

[1] Brunswick *v.* Litchfield, 2 Greenl. 28; Damon's Case, 6 Greenl. 148; Cram *v.* Burnham, 5 Greenl. 213; Ligonia *v.* Buxton, 2 Greenl. 102.

[2] The State *v.* Hodgskins, 19 Maine, 155.

[3] Jewell *v.* Jewell, 1 How. U. S. 219. See Blackburn *v.* Crawfords, 3 Wal. 175. And see ante, § 254, note.

[4] 2 Kent Com. 87; Reeve Dom. Rel. 195 et seq.; 2 Greenl. Ev. § 460.

[5] As to marriage under the Mexican law, formerly prevailing in California, see Harman *v.* Harman, 1 Cal. 215. As to the law of Mississippi, see Hargroves *v.* Thompson, 31 Missis. 211. As to Indiana, see Roche *v.* Washington, 19 Ind. 53, 57.

[6] Cheseldine *v.* Brewer, 1 Har. & McH. 152.

cases, some formal celebration was required." [1] Now this, the reader perceives, is not the doctrine which demands clerical intervention; that is, the presence, at the nuptials, of a priest either of the Church of Rome or the Church of England. It is an affirmance of a special custom, or common law, for Maryland.

§ 280. **Chancellor Walworth's Opinion.** — Chancellor Walworth considers the ancient common-law doctrine to have been, that the marriage was invalid unless celebrated *in facie ecclesiæ*, but adds: "The law on this subject, however, was unquestionably changed at the Reformation, if not before. For it is now a settled rule of the common law, which was brought into this State by its first English settlers, and which was probably the same among the ancient Protestant Dutch inhabitants, that any mutual agreement between the parties, to be husband and wife, *in præsenti*, especially where it is followed by cohabitation, constitutes a valid and binding marriage, if there is no legal disability on the part of either to contract matrimony." [2]

§ 281. **How it should be in our States.** — Whether the American courts will be influenced by the opinions expressed adversely to this kind of marriage in The Queen *v.* Millis, and so the shadow go back on the dial-plate of our jurisprudence, must be left for future judicial determination. Our courts have withstood the pressure of this decision for a good many years, without being much moved by it. And it is hardly to be presumed, that a decision which could not materially divert the course of judgment in Doctors' Commons at home,[3] will produce a greater effect in the tribunals of this country. If, however, a tendency in the direction indicated should be manifested here, we might not improperly inquire, whether, admitting for the argument, that the common law of England at the time of our emigration did make necessary the presence of a person in holy orders, this part of it was adopted by us, as suited to our new situation and peculiar institutions. If it was not, then we fall back on the law of nature; whereby,

[1] Denison *v.* Denison, 35 Md. 361, 379.

[2] Rose *v.* Clark, 8 Paige, 574; s. p. in Clayton *v.* Wardell, 4 Comst. 230, 232.

[3] Ante, § 278.

as already seen,[1] marriage is constituted by the mutual present consent of two competent persons, without the addition of any formalities. The doctrine contended for as belonging to the common law, it should be remembered, is, that the minister must be "in holy orders;" and that, in the language of the Lord Chancellor, in The Queen *v.* Millis, "holy orders, according to the law of England, are orders conferred by Episcopal ordination. This was the law of the Catholic Church in England, and the same law continued after the Reformation, as the law of the Episcopal reformed Church." It should be remembered, too, that a minister of any other church than of England or Rome was, in the eye of the law, a mere layman, and his presence of no avail.[2]

§ 282. **Continued.** — Let us, then, imagine to ourselves a company of Puritan dissenters from the churches both of Rome and of England, fleeing to these western wilds to escape what they deemed oppression and moral contagion in both of those churches, yet importing an ecclesiastic of the hated order, and paying him tithes, simply to make him an invited guest at their weddings![3] Though the American colonies were not all settled by Puritans, the spirit of this suggestion applies to most of them. So applies also another suggestion, that the strange and monstrous cross-breed between a concubinage and a marriage, which the contract *per verba de præsenti* is admitted by those who do not deem it a perfect marriage to be,[4] could find no favor with the pure morals and stern habits of the early settlers of this country; therefore, as they could not treat it as a nullity, they would invest it with the entire completeness of marriage. Furthermore, the known impossibility, in most of the colonies, of procuring the attendance of a person "in holy orders," would, of itself, within a principle to be stated in another chapter,[5] render the marriage good without his presence; and marriages so contracted, being universal, would in time gain a prescriptive sanction, and thus the practice would grow into an American common law.[6]

[1] Ante, § 218, 219, 227–229.

[2] Reg. *v.* Millis, 10 Cl. & F. 534, 861, 906; Londonderry *v.* Chester, 2 N. H. 268, 271; ante, § 270.

[3] See the remarks of Woodbury, J., in Londonderry *v.* Chester, 2 N. H. 268, 278.

[4] Ante, § 272.

[5] Post, § 392.

[6] See also the remarks of the court

§ 282 *a*. **Continued.** — As confirming this suggestion, may be cited the Maryland case, already stated,[1] as truly viewed. To be sure, according to the decision in this case, a common law, adverse equally to the law of nature and the law of England, had grown up in the colony and State. The judges gave to the local usage a wider significance than most judges would do; at the same time, it illustrates the principle. The same principle is further illustrated in some observations by the late Mr. Justice Story. A local usage had grown up in New England, or, at least, in some of the New England States, and some others, and had ripened into a common law, that a wife could convey her lands by a deed in which her husband joined, without the formality of levying a fine.[2] And this learned judge observed: "It probably originated in the necessities of the country at the early period of its settlement, when fines and recoveries were little known; or, if known, courts were rarely held, and understood little of the proper mode of proceeding. The same necessity has produced similar results in other parts of the Union."[3] In most of the colonies out of which our original States were formed, it would have been a trifling matter to levy a fine even in the early period, compared with the difficulty of procuring the presence of a priest in orders at the marriage. In Maryland, a priest could have been at any time had; yet, even there, according to this Maryland case, a usage had ripened into a law rendering his presence unnecessary. *A fortiori*, therefore, it must have been so in the other colonies. Again, it may be well questioned whether there ever was, in this country, a *priest in orders*, within the true meaning of the supposed rule which requires his presence at marriages. In England there is a certain connection between church and state which we never had, and which makes a priest an official person of a certain sort. Those who with us are called priests have no special relations to the government; and it is not apparent how their presence at marriages could amount to any thing more than that of lay

in Dumaresly *v.* Fishly, 3 A. K. Mar. 368.

[1] Ante, § 279 *a*.

[2] 1 Bishop Mar. Women, § 588 and note.

[3] Manchester *v.* Hough, 5 Mason, 67, 69.

persons, or of dissenting ministers of religion in England, which is there regarded as of no avail.

II. *How Statutes concerning the Forms are to be interpreted.*

§ 283. **General Doctrine — Clause of Nullity.** — Assuming, then, that the contract *per verba de præsenti sine copula*, or *per verba de futuro cum copula*,[1] constitutes, at the common law, a complete marriage, we are next to seek for the rules of interpretation to determine, whether or not, in a given case, a statute has altered the law upon the subject. The principle is by no means universal, that, when a statute directs a thing to be done in a particular way, it is void done in any other way; sometimes indeed it is, not always. The distinction relates to what are termed mandatory and directory statutes. If a statute is mandatory, a thing done not according to its directions is void; if directory, it is not void. Yet it is not easy, probably not possible, to lay down in advance a rule by which it can certainly be determined what statutes are directory, and what are mandatory.[2] The nature of the subject has something to do with the question. If we remember, therefore, that marriage existed before statutes, that it has ever been regarded as a thing to be favored in the law, that also it is of natural right, — we shall see very plainly, that, whatever directions a statute may give concerning its solemnization, it should be held good, though not solemnized according to the directions. Consequently, the doctrine has become established, that a marriage good at the common law is good notwithstanding the existence of any statute on the subject, *unless the statute contains express words of nullity*. This rule applies, not only to the statute as a whole, but to the several parts of it; so that, if it declares the marriage void for non-compliance with a particular provision, it is good notwithstanding a failure to comply with any other provision. This rule, like most other legal rules now well settled, has struggled against some doubts and uncertainties, but it seems never (unless we except a Massachusetts decision to which we shall presently refer[3]) to have been discarded in actual adjudication.[4]

[1] Ante, § 218, 219, 246.
[2] Bishop Stat. Crimes, § 255, 256.
[3] Post, § 285.
[4] Catterall *v.* Sweetman, 1 Robert-

§ 284. **Illustrations of the Rule as to Clause of Nullity.** — Thus, where a local statute of the colony of New South Wales provided, among other things, that Presbyterian ministers might solemnize marriages between persons of the Presbyterian communion, but not until the parties had acknowledged themselves, in a written declaration in duplicate, to be members of this communion; the Consistory Court of London held, that a marriage was not void by reason of noncompliance with the statute, though both the parties were members, not of the Presbyterian Church, but of the English Episcopal, and though they had not made the declaration required by the act.[1] So where in Pennsylvania it was provided, that "*all* marriages shall be solemnized by taking each other for husband and wife before twelve sufficient witnesses," marriages were held to be good, not celebrated in accordance with the statute. In pronouncing this opinion, however, the court seemed not entirely confident of its intrinsic correctness; but observed, that a contrary determination would bastardize the greater part of the children born for the last half-century.[2] And where the statute of New Hampshire allowed justices of the peace and ministers of the gospel to solemnize marriages; then provided penalties to be inflicted on these authorized persons solemnizing them otherwise than according to certain directions laid down; then added, in another section, that, "if any person not authorized and empowered to solemnize marriages by this act, shall join

son, 304; Stallwood *v.* Tredger, 2 Phillim. 287; Londonderry *v.* Chester, 2 N. H. 268; Pearson *v.* Howey, 6 Halst. 12, 19, 20, opinion of Ford, J.; Rodebaugh *v.* Sanks, 2 Watts, 9, 11; Helffenstein *v.* Thomas, 5 Rawle, 209; The State *v.* Robbins, 6 Ire. 23; Newbury *v.* Brunswick, 2 Vt. 151; Lacon *v.* Higgins, 3 Stark. 178, D. & R. N. P. C. 38; Dumaresly *v.* Fishly, 3 A. K. Mar. 368; Rex *v.* Birmingham, 8 B. & C. 29, 34; Hargroves *v.* Thompson, 31 Misso. 211; Park *v.* Barron, 20 Ga. 702; Stevenson *v.* Gray, 17 B. Monr. 193, 209; Ferrie *v.* The Public Administrator, 4 Bradf. 28. See Bradshaw *v.* The State, 1 Yerg. 177; Milford *v.* Worcester, 7 Mass. 48, 55; Holmes *v.* Holmes, 6 La. 463; Cannon *v.* Alsbury, 1 A. K. Mar. 76; Parton *v.* Hervey, 1 Gray, 119; White *v.* Lowe, 1 Redf. 376; Campbell *v.* Gullatt, 43 Ala. 57; Blackburn *v.* Crawfords, 3 Wal. 175. And see The State *v.* Murphy, 6 Ala. 765; Northfield *v.* Plymouth, 20 Vt. 582. Post, § 294.

[1] Catterall *v.* Sweetman, 1 Robertson, 304. And see Catterall *v.* Catterall, 1 Robertson, 580. See also Chichester *v.* Mure, 3 Swab. & T. 223, where this case, and the general doctrine here laid down, are discussed.

[2] Rodebaugh *v.* Sanks, 2 Watts, 9; s. p. Helffenstein *v.* Thomas, 5 Rawle, 209.

any persons in marriage, whether with or without publishment, and he be convicted thereof, &c., he shall pay a fine not to exceed £100 nor be less than £30;" the court held, that the parties might still contract a valid marriage at the common law, without the presence of a justice or minister.[1] So where the first English marriage act (Lord Hardwicke's) contained the clause "that, in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place whatsoever," the marriage was held good, solemnized in a different place.[2] And where a statute prohibited the solemnization of marriage without a license, the marriage was declared to be valid, though no license was had.[3] Also where the statute required that the marriage license should be taken out in a particular county, yet in the case in question it was taken out in another county, the marriage was held to be good. Said the judge: "In any view, these directory provisions, though prohibitory and even penal with respect to the officers, have not been regarded as affecting the validity of a marriage otherwise legal."[4]

§ 285. **Continued.** — Where, however, in Massachusetts, a statute provided, that no persons but justices of the peace and ministers of the gospel should solemnize marriage, and they only in certain specified cases; it was held, that the parties were themselves precluded from solemnizing their own marriage, and that a marriage by mutual agreement, not accord-

[1] Londonderry *v.* Chester, 2 N. H. 268.

[2] Stallwood *v.* Tredger, 2 Phillim. 287; compare with Catterall *v.* Sweetman, 1 Robertson, 304, 315. This case of Stallwood *v.* Tredger, if it stood alone, would hardly be adequate to support the doctrine as stated in the text; because, in fact, leaving out of view certain dicta which fell from Sir John Nicholl, who sat in the Arches Court, he put his decision on another ground. In Chichester *v.* Mure, 3 Swab. & T. 223, 232, the judge ordinary said of this case: "On what ground the Court of Delegates supported the decision of Sir John Nicholl is not stated, but Sir John Nicholl himself pronounced for the validity of the marriage on the ground that the publication of the banns, though in fact such publication took place in the parish of St. George's, Southwark, must, under the particular circumstances, be considered legally as having taken place in the parish church of St. Mary, Newington, in which parish the marriage was solemnized."

[3] Cannon *v.* Alsbury, 1 A. K. Mar. 76; Holmes *v.* Holmes, 6 La. 463.

[4] Stevenson *v.* Gray, 17 B. Monr. 193, 209, 210, opinion by Marshall, C. J., s. p. Gatewood *v.* Tunk, 3 Bibb, 246.

ing to the statute, was void.[1] But this opinion, evidently a departure from the general doctrine, was based on the assumption, that such a marriage would be void at the common law.[2] And on a later occasion, the court of this State held the marriage of minors, entered into without consent of parents, good; though a statute prohibited, under a heavy penalty, ministers and magistrates to solemnize such marriage without such consent.[3] In commenting on the New Jersey statute, Ford, J., well remarked: "Suppose this act had gone to the whole extent of declaring, that *no other* person or persons should solemnize marriages except those mentioned in it; such persons would commit an offence against the act by solemnizing marriages, for which they might be punished, but still the marriage contract between the parties themselves would remain valid. During the Commonwealth of England, Parliament passed a law *requiring* all marriages to be solemnized by justices of the peace; yet a marriage solemnized before a clergyman was holden, by all their courts, to be valid as between the parties, though the statute prohibited such priest from doing it, and for the act he was exposed to punishment.[4] Our act empowers an *ordained* minister of the gospel to solemnize marriages; but suppose a minister of the gospel should do it before he is ordained, — can any person believe, that the marriage itself would be invalid, and that either of the parties might go away at any time afterwards and contract a new alliance? Our statute prohibits ministers of the gospel from solemnizing the marriage of persons under age, without the consent of parents or guardians, under a very heavy penalty; but this does not render

[1] Milford *v.* Worcester, 7 Mass 48, 55. The present marriage act of Massachusetts is similar to that of New Hampshire, as described in Londonderry *v.* Chester, ante, § 284; and it imposes a penalty on persons who, knowing they are not authorized, "shall undertake to join *others* in marriage." R. S. c. 75, § 20. Under similar statutes, in most or all of the other States, parties would be competent to contract a valid marriage by mutual agreement alone; but whether the Massachusetts court would consider the Massachusetts law as being settled, by the above decision, the other way is uncertain. And now, since the earlier editions of this work appeared, Mass. Gen. Stats. c. 106, have somewhat varied the terms of the enactment; but whether the sense, I shall leave to others to decide. And see ante, § 279 and note.

[2] Ante, § 279.

[3] Parton *v.* Hervey, 1 Gray, 119.

[4] See the cases on this subject collected in Reeve Dom. Rel. 198.

the marriage void; on the contrary, it remains sacred and inviolable, which is the very thing that aggravates the offence." [1]

§ 286. **Comments on the Rule.** — The rule of interpretation we are considering [2] was admitted by Dr. Lushington not to be in accordance with the constructions which some other acts, relating to other subjects, have received; but "it must always be remembered," he said, "that marriage is essentially distinguished from every other species of contract, whether of legislative or judicial determination; that this distinction has been universally admitted; that not only is all legal presumption in favor of the validity and against the nullity of marriage, but it is so on this principle, — that a legislative enactment to annul a marriage *de facto* is a penal enactment, not only penal to the parties, but highly penal to the innocent offspring, and therefore to be construed, according to the acknowledged rule, most strictly." Thus, as already mentioned,[3] negative and prohibitive words in a statute are often held to render what is done under them void, but in a marriage act they do not have this effect. And he observed, of the clause we have cited from Lord Hardwicke's act,[4] that "these words are affirmative, negative, and prohibitory." [5]

§ 287. **Imposition of Penalty, &c.** — One of the most frequent forms in which this question arises is, where certain persons are forbidden to solemnize marriage, or the authorized persons are forbidden to exercise the authority in any other method than the one prescribed, and the violators are subjected to punishment. And the rule, that a marriage in disregard of such a penal prohibition is good, seems to be universally recognized.[6] Thus where the local statute of Jamaica rendered it penal for a minister to solemnize marriage without banns or license, the late attorney-general of the colony stated, before the House of Lords, on the hearing of a divorce bill, that in his opinion it

[1] Pearson *v.* Howey, 6 Halst. 12, 20. And see Holgate *v.* Cheney, Brayton, 158.

[2] Ante, § 283.

[3] Ante, § 283.

[4] Ante, § 284.

[5] Catterall *v.* Sweetman, 1 Robertson, 304. And see Bishop Stat. Crimes, § 254–256.

[6] The State *v.* Robbins, 6 Ire. 23; Damon's Case, 6 Greenl. 148; Londonderry *v.* Chester, 2 N. H. 268, 276; and other cases cited ante, § 283 et seq.

did not affect the validity of marriages celebrated without banns or license, though the celebrator would be punishable.[1] And if a statute makes it penal for a clergyman to celebrate a marriage without a license, still a marriage is good which is celebrated by him in violation of the provision, whereby he incurs the penalty.[2] This rule seems not to be peculiar to the common law. It exists also in Sicily:[3] so in Scotland, where marriages contrary to the forms established by law are very frequent, and no question remains as to their validity, the law imposes severe penalties upon the parties, the celebrator, and the witnesses.[4]

§ 287 *a*. **Limits of the Doctrine.** — The foregoing views, the reader perceives, proceed upon the assumption, that, independently of the statute, the marriage would be good. Then, the doctrine is, that, however much the statute may forbid, whether under a penalty or not, a marriage celebrated in disregard of the prohibition is good; unless, added to the prohibition, there is an express clause of nullity. For example, by the unwritten law of England, even as expounded in the case of The Queen *v.* Millis, discussed under our last sub-title, a marriage, however informal, is good if celebrated in the presence of a priest in orders. Then, if a statute requires banns, or license, or puts any other limitations upon the general right, whether the restrictions are upon the priest, the parties, or third persons, and whether they are in the form of mere naked commands, or are penal provisions, yet without a clause of nullity, a marriage celebrated in violation of such a restriction is good. And quite plainly the doctrine goes somewhat beyond this line; yet how far, it is impossible to say. Thus, even in affairs not matrimonial, statutes directing the mode of proceedings by public officers are, sometimes at least, if not always, to be construed as merely directory, not making the proceedings invalid though their terms should not be followed.[5] And it but accords with

[1] Chrewe's Case, Macqueen Parl. Pract. 599. When a statute makes the marriage void if persons *knowingly and wilfully* intermarry without the publication of banns, it is good unless *both* parties know that the banns were not published. Rex *v.* Wroxton, 1 Nev. & M. 712, 4 B. & Ad. 640.

[2] Blackburn *v.* Crawfords, 3 Wal. 175; Askew *v.* Dupree, 30 Ga. 173.

[3] Herbert *v.* Herbert, 2 Hag. Con. 263, 4 Eng. Ec. 534, 540.

[4] 1 Fras. Dom. Rel. 120 et seq.

[5] Holland *v.* Osgood, 8 Vt. 276, 280; Bishop Stat. Crimes, § 255. And see Corliss *v.* Corliss, 8 Vt. 373, 390.

the doctrine as expounded in the foregoing sections to say, that, *a fortiori*, if a statute authorizes a magistrate or dissenting minister of religion to celebrate marriage, the same rules regulate the interpretation of provisions concerning the exercise of his functions as though he were a priest in orders. In an English case, heard before the full Divorce Court, it was attempted to carry this doctrine to a point which the court would not permit. One of the provisions of the Divorce Act was in the following words: "When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death."[1] A divorced person married before the time for appeal had expired; and it was contended that, within the rule we are contemplating, the marriage was good. The argument was, that the divorce operated by its legal effect to leave the party free to marry; then, as the prohibition to marry before the expiration of the time for appeal contained no clause of nullity, the marriage had in disregard of the prohibition was good. The court, however, rejected this view. "If the case of Catterall *v.* Catterall [or Sweetman],[2]" said the learned judge ordinary, Cresswell, "is to be taken only to have decided that, when parties not incapable of contracting marriage, who are under no disability at all, but who, professing to contract and solemnize the marriage in some new manner or form provided by statute not open to them before [carrying here the doctrine further than is done in the propositions with which this section opened], and who, in making the contract, and with reference to the solemnization thereof, disregard some prohibitory enactments in such statute, that then the marriage is not thereby made void unless there are words nullifying the marriage, we see no reason to question the correctness of the decision. It is, however, quite a different question, whether, in construing a statute which gives the very

[1] 20 & 21 Vict. c. 85, § 57.

[2] Catterall *v.* Sweetman, 1 Robertson, 304; Catterall *v.* Catterall, 1 Robertson, 580; ante, § 284, 286.

right to contract at all, we are then to hold that the marriage is good, notwithstanding a disregard of words negative and prohibitory, which relate to the very capacity to contract, because there are no words expressly nullifying the contract. . . . We have considered the case principally with reference to the proper construction to be placed on the statute, and the weight to be given to Catterall *v.* Sweetman, as an authority for the construction contended for by the respondent. Some other cases were cited, and a reference was made to text-books, particularly to Bishop's treatise on 'Marriage and Divorce.' We think it unnecessary to notice all these authorities." But, it appearing that this case was distinguishable from those relied on to support the marriage, the court adjudged it to be null.[1] To the writer, this decision appears sound on the principle, that, construing all parts of the Divorce Act together, the marriage was not fully dissolved, whatever the terms of the other parts of the statute or the terms of the decree, until the period for taking an appeal had elapsed. But if this view should not be deemed sound, then the other remains; namely, that, as the right to remarry comes from the statute, the terms of the statute must be accepted as the measure of the right. This topic will present itself in still other connections in future pages of these volumes;[2] but it is deemed best that the present discussion of it should close here.

§ 288. **Form of the Marriage Ceremony.** — In connection with the foregoing discussion we are to consider the question, whether or not it is necessary that, in the actual solemnization of the marriage, there should be any particular form of ceremony in order to comply with the requirements of the various marriage statutes. We have already seen[3] what is the consent necessary in the absence of statutory and other like provisions; also we have seen,[4] that, according to the opinion of those who hold the presence of a person in holy orders to be necessary for the constitution of marriage at the common law, such person, perhaps, need not take any active part in the marriage,

[1] Chichester *v.* Mure, 3 Swab. & T. 223, 230, 232. The doctrine of this case was affirmed without discussion, in Rogers *v.* Halmshaw, 3 Swab. & T. 509.

[2] For example, post, § 293, 294, 304, 306, 306 *a*, 308 *b*.

[3] Ante, § 216 et seq.

[4] Ante, § 270.

and even if he refuses it is good. Now, if a statute fails to prescribe an exact form of ceremony; or, if it prescribes such form, yet does not declare marriages to be void entered into in disregard of the form; clearly, upon the principles already recited, the marriage, where the mutual consent of the parties is really passed, is good. And in a late English case, the learned Vice-Chancellor, Sir William Page Wood, made the following observations: "Though our law requires certain formalities to be complied with, such as the publication of banns and the like, as regards the ceremony itself it has never been held that repetition of the words of the marriage service is necessary. I have certainly known cases of complete marriage, where perhaps it was improper that the marriage should be celebrated, in which the parties, being of the poorer classes, have wilfully abstained from making the responses, especially that as to obedience on the part of the woman. *Swinburne* says, that any sign of assent is sufficient. When the hands of parties are joined together, and the clergyman pronounces them to be man and wife, they are married, if they understand that by that act they have agreed to cohabit together, and with no other person."[1]

§ 289. **Continued.** — No particular form of words, therefore, is essential to the solemnization of marriage, unless the statute not only requires the words to be used, but declares the marriage to be null where they are not used. It is sufficient for the proper person, as a minister or justice of the peace, to be present, and take cognizance of the mutual engagement of the parties to assume the marital relation.[2] But if such person — so it was held in Massachusetts, contrary to what we have seen to be claimed as the common-law doctrine — does not consent to act in his official capacity, and does not so act, though he is present, and witnesses their mutual undertaking, the ceremony has no other effect than if witnessed by an unauthorized person.[3] Yet the defect would not, as we have seen,[4] vitiate the marriage, unless the statute contained an

[1] Harrod *v.* Harrod, 1 Kay & Johns. 4, 16. And see People *v.* Taylor, 1 Mich. N. P. 198.

[2] Pearson *v.* Howey, 6 Halst. 12; Londonderry *v.* Chester, 2 N. H. 268, 280; Graham *v.* Bennet, 2 Cal. 503; The State *v.* Rood, 12 Vt. 396.

[3] Milford *v.* Worcester, 7 Mass. 48; Mangue *v.* Mangue, 1 Mass. 240.

[4] Ante, § 283.

express clause nullifying all marriages not celebrated by such official person. The Court of Queen's Bench in Ireland decided that a clergyman may marry himself.[1] This Irish decision is contrary to the Massachusetts rule on another subject. There a statute having provided for the submission, before a justice of the peace, of claims to the award of arbitrators, the submission is held to be void when one of the arbitrators is the justice before whom it is made.[2] And this Irish marriage case, being carried by appeal before the House of Lords, was there unanimously decided the other way, and the marriage held to be void.[3]

III. *Some Particular Provisions of Statutory Law.*

§ 290. **Course of the Discussion.** — It would take us too far into the field of local law to discuss fully the various statutory provisions existing in England and in this country, relating to the forms of marriage solemnization. Of those statutes which inflict punishment upon clergymen and others for irregularities in the celebration of marriages, we shall briefly treat in a separate chapter.[4] There is a short chapter on "Marriage Laws" in the author's work on Statutory Crimes.[5] And there are some other points, relating to the present sub-title, interspersed in appropriate places throughout the discussions embraced in these volumes; and still others were considered by the author in his various works connected with the criminal law.[6]

§ 291. **What Locality — "Ordained Minister" — "Cure of Souls."** — It was provided in New Jersey, "that every justice of the peace in this State," every "stated and ordained minister of the gospel," and "every religious society according to its rules," should be empowered to solemnize marriage. And the court held, that, under this statute, justices of the peace

[1] Beamish *v.* Beamish, 1 Jur. N. S. Part II. 455, and printed in full in the 2d and 3d eds. of this book.

[2] Drew *v.* Canady, 1 Mass. 158; Deerfield *v.* Arms, 20 Pick. 480.

[3] Beamish *v.* Beamish, 9 H. L. Cas. 274.

[4] Post, § 341 et seq.

[5] Stat. Crimes, § 737–739.

[6] See, as relating to marriage, 1 Bishop Crim. Law, 5th ed. § 373, 509, 555; 2 Ib. § 218, 235, 422, 445; 2 Bishop Crim. Proced. § 244; Bishop Stat. Crimes, § 149, 222, 237, 254, 585, 593, 598, 601–604, 606–613, 651, 663–665, 666, 673.

might marry out of their several counties, and ministers out of their parishes.[1] It was held, in Massachusetts, that a person ordained as a minister of the gospel in the form observed in the Baptist churches, and employed by two Baptist societies in the town in which he lives, to preach to them alternately, is, within the statute, "a stated and ordained minister of the gospel," authorized to solemnize marriage. And it is the same of a Methodist minister, ordained and afterward settled in any town for two years, according to the usage of this denomination.[2] So, in North Carolina, any person, it seems, is a minister of the gospel, who is such according to the rules of the particular religious sect to which he belongs. And the words, "cure of souls," used in the statute, do not operate to require the minister to be an incumbent of a church living, or the pastor of any one or more congregations in particular; but they do imply that he shall be something more than a minister merely, and shall have the faculty, according to the constitution of his church, to celebrate matrimony, and, to some extent at least, the power to administer the Christian sacraments, as acknowledged and held by his church.[3]

§ 292. **Publication of Banns.** — There are various decisions, under the English marriage acts, concerning the publication of banns. Thus, the banns should be published in the true names of the parties, otherwise the publication is of no avail.[4] But where, on an indictment for polygamy, it became necessary to prove the marriage, the prisoner, who had written down the names for the publication of the banns, was not permitted to deny that these were the true names. And the judge held,

[1] Pearson *v.* Howey, 6 Halst. 12. So in New Hampshire, The State *v.* Kean, 10 N. H. 347.

[2] Commonwealth *v.* Spooner, 1 Pick. 235. And see, to the like effect, Kibbe *v.* Antram, 4 Conn. 134. But a deacon of the Methodist Episcopal Church, licensed to preach, and actually preaching as a travelling circuit preacher, upon a circuit including the town in which he dwells, is not "settled in the work of the ministry" within the marriage act of Connecticut. Stat. 105, c. 1, § 2, (ed. 1808.) Goshen *v.* Stonington, 4 Conn. 209.

[3] The State *v.* Bray, 13 Ire. 289. As to New Hampshire, see The State *v.* Kean, supra; as to Connecticut, Roberts *v.* The State Treasurer, 2 Root, 381; as to Arkansas, The State *v.* Willis, 4 Eng. 196.

[4] Cope *v.* Burt, 1 Hag. Con. 434, 438; Wakefield *v.* Wakefield, 1 Hag. Con. 394, 401; Fellowes *v.* Stewart, 2 Phillim. 238, 240; Rex *v.* Billingshurst, 3 Maule & S. 250; Wright *v.* Elwood, 1 Curt. Ec. 662, and many other cases.

that he, "having signed the note for the publication of the banns of himself and Anna Timson, and having signed the register of his marriage with her by that name wherein she went, should not be permitted to defend himself on the ground that he did not marry Anna Timson, although such might not be her name."[1] Marriage by license, in England, differs from marriage by publication of banns, and it is not, or at least not always, void, though the license is taken out under a false name.[2]

CHAPTER XIV.

THE CONSENT OF PARENTS.

§ 293. **How at Common Law — Fleet Marriages.** — At the common law, the marriages of minors, without the consent of their parents, were good;[3] provided the infant parties themselves had arrived at what is called the age of consent as explained in a previous chapter.[4] It used to be, as now, unlawful in England to celebrate marriages in private, and so no clergyman of reputation would marry any persons without either license or banns. When the marriage was by license, there was an oath that the parties were of age; or, if under age, that they had the consent of parents or guardians. When by banns, their minority was no objection. All marriages other than by banns or license, called clandestine, were illegal, but not void; and they became so common that places were set apart in the Fleet and other prisons for their celebration.[5] The

[1] Rex *v.* Edwards, Russ. & Ry. 283, 284. See Rex *v.* Hind, Russ & Ry. 253.

[2] Lane *v.* Goodwin, 3 Gale & D. 610, 4 Q. B. 361; Dormer *v.* Williams, 1 Curt. Ec. 870.

[3] Rex *v.* Hodnett, 1 T. R. 96; Cannon *v.* Alsbury, 1 A. K. Mar. 76; Pool *v.* Pratt, 1 D. Chip. 252; Coleman's Case, 6 N. Y. City Hall Reporter, 3; Horner *v.* Liddiard, 1 Hag. Con. 337; Fielder *v.* Smith, 2 Hag. Con. 193; Droney *v.* Archer, 2 Phillim. 327; Priestly *v.* Hughes, 11 East, 1; Hargroves *v.* Thompson, 31 Missis. 211; The Governor *v.* Rector, 10 Humph. 57; The State *v.* Dole, 20 La. An. 378; Wadd. Dig. 229.

[4] Ante, § 143 et seq.

[5] Lord Mansfield, in Rex *v.* Hodnett, supra. Mr. Macqueen, in his late work on "Divorce and Matrimonial Juris-

want of the consent of parents was, in the language of the ecclesiastical law, an *impedimentum impeditivum*, an impediment which threw an obstruction in the way of the celebration; but not an *impedimentum dirimens*, an impediment affecting the validity of the marriage once solemnized.[1] And the Kentucky court has held, that a parent, as such, cannot maintain an action for procuring, without his consent, the marriage of an infant child; though perhaps, if the child were a servant, the suit might be maintained on the ground of loss of services.[2]

§ 294. **Lord Hardwicke's Marriage Act — Subsequent Legislation — Clause of Nullity.** — Thus stood the common law as brought by our forefathers to this country. In England, Lord Hardwicke's marriage act[3] at a later period provided, that all marriages of minors, not in widowhood, solemnized by *license* (not including marriages by banns), should be void when entered into without the consent of the father if living, or, if dead, of the guardians, or of the mother, or of the Court of Chancery. Great mischiefs were found to grow out of the absolute nullity thus created. For example, when a person under age married by license, with the consent of the mother, the father being absent and supposed to be dead, the marriage was declared void for the want of the father's consent.[4] The same rule was applied in other cases of the like nature; and neither length of cohabitation, nor lapse of time, nor consent given subsequently by the parents, nor the birth of children,

diction," states the matter of the Fleet Prison marriages as follows: "Prior to the middle of the last century, there was in the Fleet Prison a colony of degraded ecclesiastics, who derived their livelihood from celebrating clandestine marriages for fees smaller than those legally taken at the parish church. Already incarcerated for debt or for delinquencies, the reverend functionaries were beyond the reach of episcopal correction. In some instances their profits were very great. Thus we are told, that, by one of them, six thousand couples were married in a single year; whilst at the neighboring parish church of St. Andrews, Holborn, the number of marriages solemnized in the same period was but fifty-three. These clandestine connections were also celebrated at Mayfair, at Tyburn, and in other parts of London; and, through the instrumentality of the hedge parsons, they were common all over the kingdom, — in fact, greatly more so than marriages in the face of the church." Macqueen Div. & Mat. Jurisd. 2.

[1] Horner *v.* Liddiard, 1 Hag. Con. 337, 348.

[2] Jones *v.* Tevis, 4 Litt. 25.

[3] 26 Geo. 2, c. 33, § 11.

[4] Hayes *v.* Watts, 2 Phillim. 43.

could cure the defect.[1] This legal hardship the courts could not mollify by construction. Yet they not only allowed the consent to be inferred from slight circumstances; but, in the language of Lord Stowell, "to obviate the consequences which must be most unfavorable to the issue of the marriage in case of a sentence of nullity, the court has, in the construction of the statute, held (not without some controversies arising in other quarters), that it is necessary to *prove the negative of consent* in the strongest terms."[2] Later English legislation, however, has so regulated this matter, that the want of the consent of parents and guardians, though required by law, does now in no case render the marriage void.[3] If a statute requires the parental consent, but does not expressly make the marriage void celebrated without it,[4] still, it will be good, though the consent is not given.[5] In a case, not of nullity of marriage, but one involving the effect of a will, it was held, that, though a parent could withdraw his consent at any time before the nuptials were celebrated, yet, if the parent died before such celebration, the consent given in his lifetime was good.[6]

§ 295. **How in our States — Effect of Marriage on Status of Minority.** — It is presumed that there are, in some of our States, statutes making the marriage of minors who have passed the age of consent void, when the consent of parents to the marriage is wanting.[7] And in other States there are provisions of

[1] Jones *v.* Robinson, 2 Phillim. 285; Johnston *v.* Parker, 3 Phillim. 39; Reddall *v.* Leddiard, 3 Phillim. 356; Turner *v.* Felton, 2 Phillim. 92; Days *v.* Jarvis, 2 Hag. Con. 172; Droney *v.* Archer, 2 Phillim. 327; Fielder *v.* Smith, 2 Hag. Con. 193; Clarke *v.* Hankin, 2 Phillim. 328, note; Dunns *v.* Donovan, 3 Hag. Ec. 301; Rex *v.* James, Russ. & Ry. 17; Sullivan *v.* Sullivan, 2 Hag. Con. 238, 241.

[2] Days *v.* Jarvis, 1 Hag. Con. 172. And see Hodgkinson *v.* Wilkie, 1 Hag. Con. 262; Smith *v.* Huson, 1 Phillim. 287; Cresswell *v.* Cosins, 2 Phillim. 281; Sullivan *v.* Sullivan, supra; Balfour *v.* Carpenter, 1 Phillim. 221; Doe *v.* Price, 1 Man. & R. 683; Cope *v.* Burt, 1 Hag. Con. 434; 2 Burn Ec. Law, Phillim. ed. 437, 438; Rogers Ec. Law, 2d ed. 612, note *a*; Wadd. Dig. 229–231; Harrison *v.* Southampton, 21 Eng. L. & Eq. 343. And for an illustration of the principle laid down in the text, see Piers *v.* Piers, 2 H. L. Cas. 331. See, however, Rex *v.* Butler, Russ. & Ry. 61.

[3] Rex *v.* Birmingham, 8 B. & C. 29, 2 M. & R. 230; Rogers Ec. Law, 2d ed. 611. See Rex *v.* Waully, 1 Moody, 163, 1 Lewin, 23; Rex *v.* St. John Delpike, 2 B. & Ad. 226.

[4] See ante, § 283, 285.

[5] Goodwin *v.* Thompson, 2 Greene, Iowa, 329; Parton *v.* Hervey, 1 Gray, 119. See, as to the construction of the Arkansas statute, Smyth *v.* The State, 8 Eng. 696.

[6] Younge *v.* Furse, 2 Jur. N. S. 864, 26 Law J. N. S. Chanc. 117.

[7] See cases cited to the last section; also, Hiram *v.* Pierce, 45 Maine, 367;

law intended to operate as obstructions to such marriages. We shall consider these, when, in another chapter, we come to discuss the subject of offences connected with the unlawful solemnization of marriage. In Maine, the court has held, that the marriage of a minor, without the consent of his parents, does not emancipate the minor, but that the father may maintain against a third person an action for services rendered to the third person by such minor after the marriage. Tenney, J., in delivering the opinion, referred to the general rule whereby the earnings of infants belong to their father, and said, that this case did not constitute an exception to the rule. But he added: "When a contract between the parent and child exists, that the latter shall enjoy the fruit of his labors, or when the parent neglects to support him, the rule will not apply. If the father, or person having the care and control of the minor, should consent to his marriage, this may be another exception to the principle, so far as his earnings are necessary for the support of his wife and children; for the consent to the marriage may imply a consent that he should, from his earnings, have the means of discharging his new obligations." [1]

CHAPTER XV.

THE IMPEDIMENT OF A PRIOR MARRIAGE UNDISSOLVED.

§ 296. **General View — Polygamy — Bigamy.** — The subject of marriage celebrated while the party has a former husband or wife living may be viewed in two aspects, — either as a matter of criminal jurisprudence, or as one affecting the validity of the marriage so celebrated. As a matter of criminal jurisprudence, it does not come within the scope of the present work, but it is discussed by the author in his book on the law of "Statutory Crimes," under the title Polygamy.[2] It may be

The Governor *v.* Rector, 10 Humph. 57; Ferrie *v.* The Public Administrator, 4 Bradf. 28.

[1] White *v.* Henry, 24 Maine, 531, 532.

[2] Bishop Stat. Crimes, § 577–613.

here observed, that the offence of having two husbands or wives at the same time, the one *de jure* and the other *de facto*, is more frequently termed bigamy; though the broader term polygamy seems to be equally applicable, and it has been considered to be, and certainly is, the more appropriate.[1] According to the canonists, a bigamist was one who married a second time, whether the former consort were living or not, or married a widow; and there were seven distinct connections by which the offence might be committed, so as to create an incapacity for orders.[2] But polygamy, as understood in our criminal law, is a different thing; it is the act of formally entering into the marriage relation with a third person, by one sustaining at the same time the relation with a second person.[3]

§ 297. **History of Statutory Polygamy.** — In England, as observed elsewhere,[4] polygamy was always punishable canonically, while it seems not to have been a civil offence until the reign of James I.[5] In the first year of his reign, Stat. 1 Jac. 1, c. 11 (A. D. 1604) made it felony when committed "within his majesty's dominions of England and Wales;" but an exceptive clause of the statute exempted from its operation persons whose husband or wife should have remained seven years beyond sea, or the same period within his majesty's dominions not known by the other to be living, persons divorced,[6] persons whose marriages had been or should thereafter be judicially declared void, and persons married within the age of consent. This statute has been the model for all subsequent criminal legislation upon the subject, both English and American. In England, later legislation has corrected some of its defects; particularly is a mere divorce from bed and board no longer a protection against the penal consequences of a second marriage, while a seven years' residence beyond sea is no protection where the absent party is known to the other to be living.[7] In most, perhaps all, of the United

[1] Shelford Mar. & Div. 224; 1 East P. C. 464; 20 Howell St. Tr. 358, note.

[2] Poynter Mar. & Div. 142; 4 Bl. Com. 163, note.

[3] See Bishop Stat. Crimes, § 577 et seq.

[4] Bishop Stat. Crimes, § 579.

[5] Poynter Mar. & Div. 144. East says, that until this time it was left of "doubtful temporal cognizance;" but so early as Stat. 4 Edw. 1, c. 5, *de bigamis*, it was treated as a capital offence, and ousted of clergy by that statute. 1 East P. C. 464.

[6] Rex *v.* Lolley, Russ. & Ry. 237.

[7] Shelford Mar. & Div. 226; Rogers

States, there are statutes, varying more or less from each other and from the English statutes, but substantially in accordance with the present amended English enactments.

§ 298. **How the Statutes construed.** — In the author's work on the law of Statutory Crimes, he has explained the principles on which these statutes against polygamy are to be construed. It is not best to repeat here what is there said; but simply to observe, that, connected with this topic, there are some particular questions on which the courts have sometimes erred, and which demand the careful consideration of the practitioners, and of the tribunals before whom the questions shall come hereafter.

§ 299. **Effect of the Exceptions on the Marriage — Second Marriage while First subsists.** — These statutes against polygamy contain various exceptions, chiefly intended to protect from their penalties persons who unwittingly violate them. We should understand, that, if a first marriage subsists undissolved by divorce, the second marriage is void, even though, by reason of some exception in the statute against polygamy, or by force of some principle of the common law of crimes, the person entering into the marriage should be exempt from the statutory penalty.[1] But to render a second marriage void,

Ec. Law, 2d ed. 634. Stat. 9 Geo. 4, c. 31, repealing the former act, contains the following exceptions: "Provided always, that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of his majesty; or to any person marrying a second time, whose husband or wife shall have been absent from such person for the space of seven years then last past, and shall not have been known to such person to have been living within that time; or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of his first marriage; or to any person whose former marriage shall have been declared void by a court of competent jurisdiction." As to what kind of marriage the second must be, see Rex *v.* Penson, 5 Car. & P. 412. This statute of George is now, in England, superseded by the later one of 24 & 25 Vict. c. 100, § 57; which, however, does not differ from it in any essential particular.

[1] Kenley *v.* Kenley, 2 Yeates, 207; Poynter Mar. & Div. 146; Williamson *v.* Parisien, 1 Johns. Ch. 389; Fenton *v.* Reed, 4 Johns. 52; Miles *v.* Chilton, 1 Robertson, 684; Rogers Ec. Law, 2d ed. 634; Bird *v.* Bird, 1 Lee, 621; Searle *v.* Price, 2 Hag. Con. 187, 4 Eng. Ec. 524; Bayard *v.* Morphew, 2 Phillim. 321; Duins *v.* Donovan, 3 Hag. Ec. 301, 309; Sellars *v.* Davis, 4 Yerg. 503; Jones *v.* The State, 5 Blackf. 141; Young *v.* Naylor, 1 Hill, Eq. 383; Smith *v.* Smith, 1 Texas, 621; Zule *v.* Zule, Saxton, 96; Ganer *v.* Lanesborough, Peake, 17; The State *v.* Moore, 3 West. Law, Jour. 134; Martin *v.* Martin, 22 Ala. 86; Heffner *v.* Heffner, 11 Harris, Pa. 104. In a Maine case, the judges seemed to be of

the first must be valid;[1] and, where the first is null, — not merely voidable, — a judicial sentence of nullity is not necessary to authorize the party capable of marrying to enter into a second valid marriage.[2] "A void marriage," remarks Wayne, J.,[3] "imposes no legal restraint upon the party imposed upon[4] from contracting another; though prudence and delicacy do, until the fact is so generally known as not to be a matter of doubt, or until it has been impeached in a judicial proceeding, whenever that may be done." To enable the innocent party, in a polygamous marriage, to contract a second marriage, the guilty party need not be convicted of polygamy. And the burden of proving the first marriage, where the second is attempted to be impeached on the ground of the first, lies on the impeaching party.[5]

§ 300. **Void or Voidable — Distinguished from Fraud — Who apply for Dissolution.** — The reader perceives, that the impediment now under consideration renders the marriage void, in distinction from voidable.[6] There are, in the law, many cir-

the opinion, that, under the Massachusetts statute, if a woman whose husband has absented himself seven years, and is believed by her to be dead, marries again while in fact he is living, the second marriage will be merely voidable, and good until avoided. But this was not the point adjudged. "It is argued," said the learned judge, "that, though the statute [of Massachusetts] purges the felony in all cases within the exception, it does not make such marriages valid. So it has been held under a statute somewhat similar. Fenton *v.* Reed, 4 Johns. 52. But there are cases in which it is intimated, that whatever may be done with impunity can be done legally. Rhea *v.* Rhenner, 1 Pet. 105; Commonwealth *v.* Mash, 7 Met. 472." Hiram *v.* Pierce, 45 Maine, 367, 372. We have already seen, (ante, § 114), that, in New York, there is a statute of a different sort which would make a marriage under the circumstances here pointed out voidable. But there is neither judicial authority nor juridical reason for holding the marriage voidable, in distinction from void, under a statute, like the Massachusetts one, which merely exempts from punishment one who has committed what otherwise would be the crime of polygamy. A second marriage contracted while the first subsists, is void by the common law; yet, by the common law, polygamy as a crime is not known.

[1] Bruce *v.* Burke, 2 Add. Ec. 471, 2 Eng. Ec. 381; Reg. *v.* Chadwick, 12 Jur. 174, 11 Q. B. 173; Appleton *v.* Warner, 51 Barb. 270; Reeves *v.* Reeves, 54 Ill. 332; Poynter Mar. & Div. 141; Bowyer Com. 45.

[2] Patterson *v.* Gaines, 6 How. U. S. 550; Gaines *v.* Relf, 12 How. U. S. 472.

[3] Patterson *v.* Gaines, 6 How. U. S. 550, 592.

[4] If the party is not deceived, the result is the same. Martin *v.* Martin, 22 Ala. 86.

[5] Patterson *v.* Gaines, supra.

[6] Heffner *v.* Heffner, 11 Harris, Pa. 104; and cases cited to the last section; ante, § 94–96, 105 et seq., 136–142, 153, 215, 267.

cumstances in which a party to a wrong is estopped to allege the wrong in a court of justice. And on this ground, no man can come as plaintiff into a court, asking to have his marriage set aside because contracted through his own fraud; even though the marriage is really void in law, to all intents and purposes.[1] But if one, knowing himself to be incapable of contracting matrimony on account of having already entered into a marriage which is undissolved, entraps into a marriage with him another, ignorant of the impediment, he, as well as this other, may proceed as plaintiff to have this marriage declared void because of the impediment.[2] Various legal reasons may be stated for this proposition; but the more satisfactory one is, that the impediment was a thing entirely distinct from the fraud, not depending in any measure upon it.[3]

§ 301. **Collateral Consequences.**— The collateral consequences, to third persons, and to the parties themselves, of holding a marriage to be void, have already been mentioned; and they will be further considered in our second volume:[4] as, for instance, on the death of the man the woman can have no dower in his estate;[5] and so of all the other rights which depend upon marriage. The common law allows no mitigation of these disastrous consequences, in favor of persons however innocently contracting a second marriage during the continuance of the first, or in favor of a party deceived by the artifice of the other into the marriage, or in favor of their innocent children. But there is a tendency, in the legislation of this country, toward the adoption of the more merciful rules of the modern civil law, as it has been in some countries modified by the canon law. Thus in Missouri, though a marriage in the lifetime of a former husband or wife is void, still a statute makes the children legitimate; providing, that the issue of all marriages deemed null in law, or dissolved by divorce, shall nevertheless be legitimate.[6] And there is at present a like

[1] Ante, § 149, 214.

[2] Miles *v.* Chilton, 1 Robertson, 684; Norton *v.* Seton, 3 Phillim. 147, 1 Eng. Ec. 384. And see Ponder *v.* Graham, 4 Fla. 23; Martin *v.* Martin, 22 Ala. 86.

[3] On the subject of this section, consult also Amory *v.* Amory, 6 Rob. N. Y. 514; Robbins *v.* Potter, 98 Mass. 532; Johnson *v.* Johnson, 1 Cold. 626.

[4] Vol. II. § 688 et seq.

[5] Smart *v.* Whaley, 6 Sm. & M. 308; Higgins *v.* Breen, 9 Misso. 493.

[6] Lincecum *v.* Lincecum, 3 Misso. 441.

statute in Texas;[1] also in California.[2] Statutes of this general sort exist likewise in Maine,[3] in Maryland,[4] and in various other of our States.

§ 302. **Continued — Civil Law Rule — Louisiana — Mexico — Texas — Spain, &c.** — In Louisiana, the jurisprudence of which State rests in some degree on the civil law of Spain,[5] the courts hold, that, where a woman is married to a man having a former wife, with whom his marriage is still subsisting, if she were deceived by him into this marriage, being ignorant of any impediment, she is entitled, while the deception lasts, to all the rights of a wife; and the children, born during this period, are legitimate.[6] So, in Texas, before the introduction of the common law into the State, it being subject to the law of Mexico, if a woman married a man having a wife already, she being ignorant of the impediment, the law cast on her all the obligations, and invested her with all the rights, of a lawful wife, while this ignorance of the impediment lasted. The law of Spain was the same. The matter was much discussed in a Texas case; and the court further held, that, by the Spanish law, formerly existing in Texas, if there was an impediment, like a prior marriage, and the second marriage was entered into in ignorance of the impediment; still, it might indeed be dissolved for the cause of the impediment, but, even after such dissolution, it, as to whatever had gone before, "produces," in the language of the court, "the civil effect of true matrimony, as well with respect to the spouses, as with respect to the offspring. The interests of the consorts at separation will be regulated according to the disposition which would have been made of them in case of dissolution by death or divorce. This good faith produces its results as long as it continues; and, when it ceases, its effects also cease." So likewise, by the same system of jurisprudence, contrary, perhaps,[7] to the rule of the common law, a putative marriage is converted into a real marriage by the removal of the disability; as, if there be a for-

[1] Hatwell *v.* Jackson, 7 Texas, 576.
[2] Graham *v.* Bennet, 2 Cal. 503.
[3] Hiram *v.* Pierce, 45 Maine, 367.
[4] Earle *v.* Dawes, 3 Md. Ch. 230.
[5] Bishop First Book, § 57, 58, and note.
[6] Clendenning *v.* Clendenning, 15 Mart. La. 438; Gaines *v.* New Orleans, 6 Wal. 642. And see Hubbell *v.* Inkstein, 7 La. An. 252; Summerlin *v.* Livingston, 15 La. An. 519.
[7] See ante, § 139–141.

mer husband or wife of one of the parties living, the marriage becomes good on the death of such person.[1]

§ 303. **Continued.** — Mr. Burge, in language somewhat less precise, states the rule under consideration thus: that such a marriage, "*although null and void*, will have the effect of entitling the wife, if she be in good faith, to enforce the rights of property which would have been competent to her if the marriage had been valid, and of rendering the children legitimate." He informs us that this species of marriage was not recognized by the civil law, having sprung from the canon; was unknown in the laws of England, Ireland, and Holland, yet was admitted into France, Spain, and Germany; and was adopted by the code civil. It has struggled for a doubtful existence in Scotland.[2]

CHAPTER XVI.

IMPEDIMENTS FOLLOWING DIVORCE.

§ 304. **Divorce permits Remarriage — Restraining Clause in Statute.** — The operation of a decree of divorce from the bond of matrimony, when unencumbered by any statutory limitations or restrictions, is to free the parties respectively from all the obligations which the dissolved marriage imposed; and to leave them, consequently, at liberty to contract other marriages, the same as though the first had never subsisted. In the language of a learned judge: "With the dissolution, the obligations arising from the marriage are completely discharged, and the parties stand in the same position as though such marriage had never been contracted."[3] But in some of our States and in some countries, the law puts restrictions and prohibitions, more or less broad, on one or both of the parties to the divorce. Thus, the Kentucky statute provides, that the decree of divorce shall not "authorize the injured

[1] Smith *v.* Smith, 1 Texas, 621; Lee *v.* Smith, 18 Texas, 141. See also Patton *v.* Philadelphia, 1 La. An. 98.

[2] 1 Burge Col. & For. Laws, 152.

[3] Field, C. J., in Barber *v.* Barber, 16 Cal. 378.

party again to contract matrimony within two years from the time of pronouncing such final decree." And the courts hold, that, if the injured party contracts a second marriage within the two years, it is a nullity, void for every purpose.[1]

§ 305. **Restraining Clause in Statute, continued — Reason for the Provision.** — And in many of the States of this country, the guilty party after a divorce is excluded by statute from entering into a second marriage, during the lifetime of the innocent party. This is a peculiarity of the American law, and it is known in only a part of the States. Whether the provision is a wise one is a question on which opinions are divided. Plainly, a person who has conducted badly in one matrimonial alliance cannot himself present a claim to be protected in another; but, in divorce law, we are to consider more the interests of the public at large than of particular individuals. And if a punishment is to be imposed for any crime,[2] especially therefore for a matrimonial one, it should be of a nature calculated to benefit, not to prejudice the public. Consequently, when a man is shown to have been unfaithful to the obligations of a particular marriage, if he is to be punished for the unfaithfulness beyond having his connection with the woman thereby wronged dissolved, reason would seem to demand that he be shut up, — not left at large under disabilities constantly goading his evil nature to wrong as many more women as he can seduce by arts and blandishments. If marriage is in any instance a protector of the public virtue, it must be particularly so when a bad man is held by the cords of a domestic affection from preying upon the female part of the community abroad. Some, indeed, apprehend that liberty of marriage to the guilty party, after a divorce, will induce persons weary of their matrimonial connections to commit offences for the sake of being divorced. But experience shows, that such is not often done; and surely if an innocent individual is bound by the form of marriage to one who would do this, mercy to such innocent person demands that the bond be unloosed.

[1] Cox *v.* Combs, 8 B. Monr. 231. See post, § 306.

[2] 1 Bishop Crim. Law, 5th ed. § 209–211.

§ 306. **Order of the Discussion — General Doctrine — Clause of Nullity.** — We shall discuss this prohibition more at large when we come, in the second volume,[1] to consider the effects of divorce. We shall there see, that, being of a penal nature, it does not, on the one hand, take away the right of the party to marry out of the jurisdiction which imposes it; neither, on the other hand, does it apply to foreign divorces. Whether the mere prohibition, without words of nullity,[2] should be construed to make the marriage entered into contrary to the prohibition void, is perhaps a question of doubt. Usually the courts appear to have regarded it as having this effect;[3] but, in a late Georgia case, the court intimate pretty distinctly that the marriage is only voidable at the most, perhaps perfectly good.[4] And this intimation is surely worthy to be seriously considered in cases hereafter to arise.

§ 306 *a*. **Clause of Nullity, continued.** — If we are to look at this question as one of principle, we must doubtless be governed in some measure by the particular language of the statute. We have already seen,[5] that where, in England, the divorce act forbade a remarriage until the period for appeal had elapsed, a marriage after sentence pronounced and before the expiration of this time was held — and it is believed by the author properly so — to be void. In the principal case in which this was so adjudged,[6] a doubt was expressed whether, in the absence of any statutory provision on the point, a divorce dissolving a valid marriage operates in law to authorize the divorced parties to remarry. Whatever foundation, or whether any, there may be for such a doubt in England, there is none in this country;[7] for with us it was never questioned, that, in the absence of all provision on the point, a divorced person, whether plaintiff or defendant in the divorce suit, is entitled to remarry the same as though the first marriage had never existed.[8] Now, if, after a system of divorce laws has been established, and parties have sought and obtained divorces, a

[1] Vol. II. § 698–704.

[2] Ante, § 283 et seq.

[3] Ante, § 304; Ponsford *v.* Johnson, 2 Blatch. 51; Haviland *v.* Halstead, 34 N. Y. 643; Smith *v.* Woodworth, 44 Barb. 198.

[4] Parke *v.* Barron, 20 Ga. 702.

[5] Ante, § 287 *a*.

[6] Chichester *v.* Mure, 3 Swab. & T. 223.

[7] Ante, § 304.

[8] Vol. II. § 698–704.

statute should be passed forbidding any divorced person to contract a new marriage, this statute would subject the person violating it to indictment, even though it was silent as to the penalty.[1] Then, after the statute had thus expended itself, it could not on principle be carried further, and render the marriage null, unless it also contained an express clause of nullity.[2] There could be no doubt about this proposition as applied to divorces which had already occurred, and one cannot see why it should not apply equally to future divorces. On the other hand, if the same statute which authorized the divorce expressly provided that it should not operate to authorize the divorced party to remarry, the case would seem pretty plainly to fall within a principle already considered,[3] and a new marriage contracted in the same State would be void; though it would be good if contracted in another State or country.[4] It cannot be doubted that these two points, standing at the extremes, are correct as thus stated; but, between these points, there are various shades and kinds of statutory provision, the effect of which may be more or less open to question.

§ 307. **Marriage with Partner in Adultery.** — In Scotland, they have a form of this prohibition not known in the United States. It is, that the guilty party, after a divorce for adultery, shall not marry the *particeps criminis*. This impediment is said to have had an early existence in the canon law, into which it was introduced from the Roman, though the canon law was afterward changed; but by some means the old rule became established in Scotland.[5] In England, while divorces dissolving valid marriages were granted only by act of Parliament, there was a standing order of the House of Lords, that every divorce bill brought in should contain a clause of this sort. "The exigency of the standing order," observes Macqueen, "makes it of course imperative to introduce such a clause into every bill of divorce for adultery; but, though required in the bill, the clause is not retained in the act, — the usual course being,

[1] Bishop Stat. Crimes, § 138; 1 Bishop Crim. Law, 5th ed. § 237, 238.

[2] Ante, § 283–287 *a*.

[3] Ante, § 287 *a*.

[4] Vol. II. § 701; Ponsford *v.* Johnson, 2 Blatch. 51; Webb's Estate, 1 Tucker, 372.

[5] 1 Fras. Dom. Rel. 82.

that some noble lord in committee moves to have it struck out, a motion which passes without resistance; or, should resistance be offered, it is overruled, — all the feelings of humanity, and all the dictates of policy, suggesting that the guilty parties ought not to be debarred from making amends to social order by entering into matrimony. To prevent marriage in such a case would be but to prolong the unseemly spectacle of adultery; and to inflict bastardy on the innocent and helpless offspring."[1]

§ 307 *a*. **Remarriage by Permission of Court.** — In one or more of our States, in which, according to the general terms of the statutes, the guilty party is not permitted to marry after the divorce, there is a special provision authorizing the court to grant leave to remarry, on application made for the special purpose. It it so, of late years, in Massachusetts. The application is addressed to the discretion of the judge; and it is a familiar principle of the law that a discretion, committed to a court of justice, is a judicial discretion, to be exercised according to rule, and not according to the personal views of the particular individual who happens to be presiding in the court.[2] Concerning the discretion to grant leave to remarry, we are lacking in decisions sufficient to enable the author to lay down rules. In a Massachusetts case, where, more than three years after a divorce was pronounced against a woman for her adultery, she petitioned the court for leave to marry again, it appeared that she had lived with her father since the divorce, and had maintained a good character; she was of suitable age, and, in the opinion of the witness, a fit person to marry. But the learned judge who heard the evidence held, that, admitting it to be true, "it did not establish a case to which the provisions of the statute ought to be applied, but that still further facts should be proved to entitle the petitioner to the decree prayed for; that, as a general rule, a party who has violated the obligation of the marriage covenant by committing the crime of adultery is not entitled to the confidence of the court, nor to a decree that certifies such confidence, and may enable the party to practise deceit on another party; that there are

[1] Macqueen Parl. Pract. 509.

[2] Post, § 830; 1 Bishop Mar. Women, § 676; Morgan *v.* Morgan, Law Rep. 1 P. & M. 644.

a great many exceptional cases, to which the statute may be usefully applied; for example, a party who has been absent from the State for a few months may, on his return, find a decree of divorce against him, upon notice published in a newspaper which never reached him, and upon *ex parte* evidence, which might have been refuted if he had been present; or perhaps he may prove extenuating circumstances and repentance, and a thorough change of principles and character. But if the statute were to be construed as the petitioner contends it should be, it would operate as a temptation to any party desiring to get rid of a husband or wife to commit adultery in some place beyond the jurisdiction of our criminal courts, as a convenient method of accomplishing the object by the instrumentality of this court; and the discretion of the court ought to be exercised with the greater caution, because hearings on such petitions are *ex parte*, there being no person interested to oppose them, or inform the court of the whole truth of the case. The judge, therefore, ordered the petition to be dismissed, and decided that the petitioner had no right of exception." The full court, however, reversed this decision, Dewey, J. observing: "No exception lies to the ruling of a judge upon a matter simply discretionary. Had the ruling in this case been of this character, it would not be open to review upon this bill of exceptions. But the court in the present instance have ruled as a matter of law, that, upon the facts offered in evidence, and conceding them to be true, they did not establish a case to which the provisions of Stat. 1864, c. 216, ought to be applied. This abstract proposition, we think, was not correct. Such evidence certainly was not conclusive, and a broad field for discretion is open to the presiding judge upon all the surrounding circumstances and facts bearing upon the particular case. But in the absence of any such other facts unfavorable to the petitioner, we think the evidence offered in the present case might be deemed sufficient to authorize the granting of the petition, and it would be competent for the court to grant it."[1]

[1] Cochrane, Petitioner, 10 Allen, 276.

CHAPTER XVII.

IMPEDIMENTS OF RACE AND OF CIVIL CONDITION.

§ 308. **Whites and Blacks — "Negro" — "Mulatto," &c. —** There are, in several of our States, statutes to prevent intermarriages between persons of the negro, the Indian, and the white races. Such a statute existed in Massachusetts until 1843, when it was repealed.[1] These statutes are not, in general, difficult to be interpreted; but questions have sometimes arisen respecting the meaning of such words as "negro," "mulatto," "person of color," "white person," and the like, where there is in the individual a blending of blood. Thus, in a Maine case, it was observed by Shepley, C. J.: "There is a difference of opinion respecting the proportion of African blood which will prevent a person possessing it from being regarded as white. Some courts appear to have held, that a person should be so regarded when his white blood predominated both in proportion and in appearance. Those least disposed to consider persons to be white who have any proportion of African blood, have admitted that persons possessing only one eighth part of such blood should be regarded as white."[2] Upon the interpretation of such words as these the author shed what light he conveniently could, in his work on "Statutory Crimes."[3] It may be here added, that the North Carolina statute, which prohibits marriage between white persons and "persons of color," includes in the latter class all who are descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person.[4]

§ 308 *a*. **Emancipation.** — The new state of things which has been brought about by emancipation in our late slave-

[1] See Medway *v.* Natick, 7 Mass. 88; Medway *v.* Needham, 16 Mass. 157; The State *v.* Hooper, 5 Ire. 201; The State *v.* Brady, 9 Humph. 74; Bailey *v.* Fiske, 34 Maine, 77; The State *v.* ore, 1 Ire. 378.

[2] Bailey *v.* Fiske, 34 Maine, 77.

[3] Bishop Stat. Crimes, § 274.

[4] The State *v.* Watters, 3 Ire. 455. And see The State *v.* Melton, Busbee, 49.

holding States has not generally wrought any change in these statutory provisions. Thus, in North Carolina they are held to be still in force.[1] And in Georgia it is held, that the provision of the Revised Code prohibiting the intermarriage of whites and blacks is not inconsistent with the constitution of 1868, by which, therefore, it is not repealed. The article providing that "the social status of the citizen shall never be the subject of legislation," not only restrains the legislature from enacting new laws on the subject, but also from abrogating the former ones.[2]

§ 308 *b*. **Clause of Nullity.** — It will be seen, on consulting the cases cited to the foregoing sections, that the statutes on this subject generally contain an express clause of nullity, making the marriage celebrated contrary to their prohibitions "void." Therefore such marriages are held to be, of course, mere nullities; no suit is necessary to set them aside, either party is at liberty to contract a real marriage, and none of the legal consequences of marriage follow from them.[3] If a statute should be found which merely inflicts a penalty for entering into such a marriage, or merely prohibits the marriage without an express penalty, but containing no clause of nullity, then plainly, on principle, though the question seems never to have passed into express adjudication, the marriage would be good.[4]

§ 309. **Free Negroes and Slaves.** — In former times, there were statutes against free negroes intermarrying with slaves, without the consent of the masters of the slaves.[5] Such marriages would, of course, if there were no statute, be void on principles we have already considered;[6] for the incapacity of the enslaved party to marry would constitute just as effectual an impediment as if the incapacity attached to both parties. But the object of these statutes was to inflict a punishment on offenders.

§ 310. **Constitutional Incapacity to contract.** —In Indiana, the constitution of the State declared, that all contracts made with

[1] The State *v.* Hairston, 63 N. C. 451; The State *v.* Reinhardt, 63 N. C. 547.

[2] Scott *v.* The State, 39 Ga. 321.

[3] Succession of Minvielle, 15 La. An. 342; ante, § 105.

[4] Ante, § 283–287 *a*, 306 *a*.

[5] The State *v.* Roland, 6 Ire. 241.

[6] Ante, § 156 et seq.

negroes coming into the State after its adoption should be void; and this provision was held, by the court, to render void a marriage celebrated between a free negro man and a free negro woman, the latter of whom had come into the State since the adoption of the constitution.[1]

§ 311. **Other Impediments of like Sort.** — Says Mr. Burge: "There were certain impediments to marriage peculiar to the civil law, which are not adopted in the codes of other countries. These were impediments described as being *ex causa potestatis*. Thus, a tutor or curator could not marry his ward, until his office had terminated, or unless his accounts had been passed. A person administering a government or public office in a province, and the members of his family, were not permitted to intermarry with a person domiciled in his province, unless they had been betrothed to each other before he had accepted the office. Notwithstanding these prohibitions, the subsequent voluntary cohabitation of the parties, after the relation which caused the prohibition had ceased, rendered the marriage valid *ab initio*." [2]

CHAPTER XVIII.

CONSANGUINITY AND AFFINITY.

§ 312. **Consanguinity and Affinity distinguished.** — The two impediments of consanguinity and affinity are usually treated of as one; because, in England, little or no distinction is made between them. Yet in their essence they differ as widely as right and wrong do in other cases. The impediment of consanguinity exists in the law of nature, and it is recognized everywhere. The impediment of affinity is one of mere civil institution; and in some countries it is not known, or is but slightly known. It has no foundation in nature.

§ 313. **Consanguinity, continued — Why an Impediment — Affinity.** — Marriages between persons closely allied in blood

[1] Barkshire *v.* The State, 7 Ind. 389. [2] 1 Burge Col. & For. Laws, 138.

are apt to produce an offspring feeble in body, and tending to insanity in mind. They are everywhere prohibited; but the more common reason assigned for the prohibition is, that the toleration of them would impair the quiet and concord of families, jeopardize female chastity, and hinder the formation of favorable alliances. And while this reason appears utterly insufficient of itself, it shows how, in the world's history, the promptings of the nature of man frequently carry him in the right direction, where his mere intellect fails to discern the path. Yet even here he is liable to err; as, in the present instance, the blending of bad reason with a correct instinct has, in the English law, led to the establishment of the impediment of affinity, much to the detriment of good morals.

§ 314. *Rules to determine what Marriages are forbidden by our Unwritten Law:* —

Stat. Hen. 8 — How before. — We have already seen, that, previous to Stat. 32 Hen. 8, c. 38, which is a part of the common law of this country, the impediments of consanguinity and affinity were so extended by the church as to become burdensome; and that this statute, enacted for the correction of the evil, forbade the ecclesiastical courts to draw into question marriages "without the Levitical degrees," not prohibited by "God's law."[1] In the construction of this statute, the following points have been established: —

Affinity same as Consanguinity. — First. That *affinity is an impediment to the same extent as consanguinity*. Thus, in the case of Butler *v.* Gastrill, the judge said: "It was necessary, in order to perfect the union of marriage, that the husband should take the wife's relations, in the same degree, to be the same as his own, without distinction, and *vice versâ;* for, if they are to be the same person, as was intended by the law of God, they can have no difference in relations, and by consequence the prohibition touching affinity must be carried as far as the prohibition touching consanguinity; for what was found convenient to extinguish jealousies amongst near relations, and to govern families and educate children amongst people of the same consanguinity, would likewise have the same operation

[1] Ante, § 107, 108, 120, note.

amongst those of the same affinity.[1] And when we consider who are prohibited to marry by the Levitical law, we must not only consider the mere words of the law itself, but what, by a just and fair interpretation, may be adduced from it."[2] In the application of this rule, let us observe, the kindred of the husband are not in affinity to the kindred of the wife;[3] as, for example, the husband's brother may marry the wife's sister;[4] father and son may marry mother and daughter;[5] and a man may marry the widow of his former wife's brother.[6] In causes other than matrimonial it is held, that relationship by affinity ceases on the dissolution by death or otherwise of the marriage which created it,[7] except as to the children of the marriage;[8] and, if the same rational view had been carried by the courts of England into the construction of this statute, less occasion would there have been to deprecate the result.[9]

[1] This absurd reasoning is the foundation whereon, at the present day, rests, in England, the doctrine which prevents a man from marrying the sister of his deceased wife. We shall see, further on in this section, that, in matters not matrimonial, the relationship by affinity is held by the courts to cease with the dissolution which death brings to the marriage; and so the rule ought to be in cases matrimonial. If, when a man's wife dies, she is still his wife, then, of course, her sister is still his sister. But, on this reasoning, since he has already one wife, though indeed she is not dwelling in flesh and blood, he should be precluded from taking any other, not merely precluded from taking this wife's sister. If, on the other hand, the wife is, after her death, no more his wife, then is her sister no more his sister. And though men who have no other idea of religion than to regard it as a bundle of forms may not see how the termination of the relationship by the death of the wife is of any consequence in the case, yet those who discern differently will discover nothing unseemly in practically acting upon a fact which everybody knows to exist.

[2] Butler *v.* Gastrill, Gilb. Ch. 156, 158.

[3] See, on this point, Paddock *v.* Wells, 2 Barb. Ch. 331. Kelly *v.* Neely, 7 Eng. 657, proceeded on a contrary doctrine.

[4] Shelford Mar. & Div. 174; Wood's Civil Law, 119; Poynter Mar. & Div. 117.

[5] Oxenham *v.* Gayre, Bacon Ab. tit. Mar. & Div. (A.)

[6] Taylor Civil Law, 339.

[7] Blodget *v.* Brinsmaid, 9 Vt. 27; The State *v.* Shaw, 3 Ire. 532; Moses *v.* The State, 11 Humph. 232; Morgan *v.* The State, 11 Ala. 289; Goodall *v.* Thurman, 1 Head, 209; 1 Bishop Crim. Proced. 2d ed. § 901.

[8] Paddock *v.* Wells, 2 Barb. Ch. 331. See Ex parte Hunt, 5 Cow. 284.

[9] How far an American court would follow the English rule of construction of a statute worded like the English, I cannot exactly say. In one case the Virginia tribunal followed the English rule. Commonwealth *v.* Perryman, 2 Leigh, 717. Post, § 319, note. But in a Vermont case, Collamer, J. observed: "The relationship by consanguinity is, in its nature, incapable of dissolution; but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is, by affinity, brother to his wife's sister, yet, upon the death of

§ 315. **Illegitimate Children.** — Secondly. In respect to the impediments of consanguinity and affinity, *illegitimate children are considered the same as legitimate;* "for the disqualifications of bastardy are of civil institution only, and do not intrinsically weaken the natural ties of kindred." [1]

§ 316. **What Relationships prohibited.** — Thirdly. The statute is construed to prohibit marriages in *the entire ascending and descending line;* also marriages between *collaterals as far as, and including, the third degree of the civil reckoning.* In this mode of computing the degrees, we go from the *præpositus* up to the common stock, thence down, counting one for each step.[2] Therefore under this statute it is incestuous for a man to marry his deceased wife's sister,[3] or for a woman to marry her deceased husband's brother,[4] or for a man to marry his deceased wife's sister's daughter,[5] or his deceased wife's mother's sister,[6] or his own sister's[7] or brother's[8] daughter, or the daughter of his deceased wife by a former husband;[9] these marriages all being within the second or third degree, either of consanguinity or affinity. But for a man to marry the widow of his great-uncle,[10] she being in the fourth degree from him, has been held lawful; and the statute itself recognizes the right of cousins-german, also of the fourth degree, to intermarry.

§ 317. **Half Blood.** — Fourthly. Moreover, in the construc-

his wife, he may lawfully marry her sister. Such is the law of this State, whatever may be the statute of Hen. 8." Blodget *v.* Brinsmaid, supra, p 27, 30.

[1] Poynter Mar & Div. 118 and note; Shelford Mar. & Div. 174; Reg. *v.* St. Giles, 11 Q. B. 173, 244; Horner *v.* Liddiard, 1 Hag. Con. 337, 352; Haines *v.* Jefcott, 5 Mod. 168, Comb. 356; Blackmore *v.* Brider, 2 Phillim. 359, 361; Gibs. Cod. 412; Woods *v.* Woods, 2 Curt. Ec. 516, 521, 7 Eng. Ec. 181, 182; Morgan *v.* The State, 11 Ala. 289, 291; Reg. *v.* Brighton, 1 B. & S. 447. But see The State *v.* Roswell, 6 Conn. 446.

[2] Butler *v.* Gastrill, Gilb. Ch. 156, 158, 159.

[3] Hill *v.* Good, Vaughan, 302; Ray *v.* Sherwood, 1 Curt. Ec. 173; Reg. *v.* Chadwick, 12 Jur. 174, 11 Q. B. 173.

[4] Aughtie *v.* Aughtie, 1 Phillim. 201, 1 Eng. Ec. 72.

[5] Man's Case, Cro. Eliz. 228, Sir F. Moore, 907; Wortly *v.* Watkinson, 2 Lev. 254, 3 Keb. 660; Withipole's Case, cited in Howard *v.* Bartlet, Hob. 181; Snowling *v.* Nursey, 2 Lutw. 1075; Denny *v.* Ashwell, 1 Stra. 52; Clement *v.* Beard, 5 Mod. 448; Co. Lit. 235; Ellerton *v.* Gastrill, 1 Comyns, 318.

[6] Butler *v.* Gastrill, supra.

[7] Watkinson *v.* Mergatron, T. Raym. 464; Woods *v.* Woods, 2 Curt. Ec. 516, 7 Eng. Ec. 181; Burgess *v.* Burgess, 1 Hag. Con. 384.

[8] Murgatroyd *v.* Watkinson, T. Jones, 191.

[9] Blackmore *v.* Brider, 2 Phillim. 359.

[10] Harrison *v.* Burwell, 2 Vent. 9 Vaugh. 206.

tion of this statute, *no difference is made between the whole and the half blood.* Thus it is held incestuous for a man to marry the daughter of his brother of the half blood,[1] or the daughter of his half sister.[2]

§ 318. *Further Views:* —

Opinions of the Church. — The expositions thus stated of the statute of Henry VIII. accord with contemporaneous opinions of the Church of England. And in 1563, Archbishop Parker published a table of prohibited degrees, usually known as Archbishop Parker's Table of degrees, ever since, in England, the basis of all judicial opinion on the subject. It was confirmed by the 99th canon of 1603; and though, as we have already seen,[3] the canons of this date do not, *proprio vigore*, bind the laity, having received only the royal assent, not the assent of Parliament, — still, it was judicially observed, that "these tables do show the sense of the Church of England, and so are a proper exposition of the law of God, and by consequence ought to have great weight with the judges when they expound the Levitical law; and they are plainly the decision of this reformed church touching the crime of incest; and they do retrench the exorbitant and unwarrantable constructions of the Church of Rome, who made the law of God of none effect by their traditions; and yet they expound the law of God in its full latitude."[4]

[1] Oxenham *v.* Gayre, Bac. Ab. tit. Mar. & Div. (A). See also, as to the prohibited degrees, Gibs. Cod. 412–414.

[2] Reg. *v.* Brighton, 1 B. & S. 447.

[3] Ante, § 51.

[4] Butler *v.* Gastrill, Gilb. Ch. 156. And see Gibs. Cod. 414. According to this table,

A man may not marry his	*A woman may not marry her*
1. Grandmother.	1. Grandfather.
2. Grandfather's wife.	2. Grandmother's husband.
3. Wife's grandmother.	3. Husband's grandfather.
4. Father's sister.	4. Father's brother.
5. Mother's sister.	5. Mother's brother.
6. Father's brother's wife.	6. Father's sister's husband.
7. Mother's brother's wife.	7. Mother's sister's husband.
8. Wife's father's sister.	8. Husband's father's brother.
9. Wife's mother's sister.	9. Husband's mother's brother.
10. Mother.	10. Father.
11. Step-mother.	11. Step-father.
12. Wife's mother.	12. Husband's father.
13. Daughter.	13. Son.
14. Wife's daughter.	14. Husband's son.

§ 319. **Modern Views.** — But though the aforementioned expositions are in harmony with the former, perhaps also the present, opinions of the Church of England, there has been of late a growing disposition, even in the English Church, to remove some of the impediments of affinity. Especially under the light of modern days has it appeared alike unjust and impolitic to forbid marriage with the sister of a deceased wife, — a prohibition scarcely known in the United States.[1] A truly enlightened view will doubtless discard altogether affinity as an impediment, while it will extend somewhat the degrees of consanguinity within which marriages should be forbidden. For instance, while these connections between cousins-german sometimes seem productive of good, they are frequently disastrous to the interests of the parties, and especially of their enfeebled offspring.

§ 320. **Voidable or Void.** — We have seen, that, by the common law of England, marriages within the prohibited degrees are voidable, not void;[2] that an American statute, allowing marriage to persons "not prohibited by the laws of God," was construed to render the marriage of a man with his sister's daughter voidable, as at the common law; that in England,

A man may not marry his	*A woman may not marry her*
15. Son's wife.	15. Daughter's husband.
16. Sister.	16. Brother.
17. Wife's sister.	17. Husband's brother.
18. Brother's wife.	18. Sister's husband.
19. Son's daughter.	19. Son's son.
20. Daughter's daughter.	20. Daughter's son.
21. Son's son's wife.	21. Son's daughter's husband.
22. Daughter's son's wife.	22. Daughter's daughter's husband.
23. Wife's son's daughter.	23. Husband's son's son.
24. Wife's daughter's daughter.	24. Husband's daughter's son.
25. Brother's daughter.	25. Brother's son.
26. Sister's daughter.	26. Sister's son.
27. Brother's son's wife.	27. Brother's daughter's husband.
28. Sister's son's wife.	28. Sister's daughter's husband.
29. Wife's brother's daughter.	29. Husband's brother's son.
30. Wife's sister's daughter.	30. Husband's sister's son.

[1] Marriages of this kind have been, and I presume still are, unlawful in Virginia. In Commonwealth *v.* Perryman, 2 Leigh, 717, — the statute having provided, that, "if the brother hath married, or shall marry, his brother's *wife*," the marriage should be dissolved, the parties fined, &c. — the court held the offence to be committed by marrying the brother's widow. See also Hutchins *v.* Commonwealth, 2 Va. Cas. 331; Commonwealth *v.* Leftwich, 5 Rand. 657; Kelly *v.* Scott, 5 Grat. 479; ante, § 314, note.

[2] Ante, § 112; Hinks *v.* Harris, Carth. 271, 2 Salk. 548.

since 1835, these marriages are void by statute;[1] and that they are void in most of the American States.[2] The suit for nullity, on the ground of consanguinity or affinity, may in the English practice be promoted by either party to the marriage,[3] or by third persons having an interest in the question.[4]

CHAPTER XIX.

IMPOTENCE, OR PHYSICAL INCAPACITY.

§ 321. **General Doctrine — How Chapter divided.** — Marriage between two persons of one sex could have no validity, because such a connection would not perpetuate population, or produce the comforts and solace proceeding from the family relationship. And the same is substantially true of a union between two persons of differing sex, if one or both of them is destitute of the sexual organs, or if those organs are so deficient in form or strength that they cannot perform their proper function. "It is apparent enough," observed Lord Penzance sitting in the English Divorce Court, "that without sexual intercourse the ends of marriage, the procreation of children, and the pleasures and enjoyments of matrimony, cannot be attained."[5] Therefore, for a marriage to be entirely good, the parties must have their sexual organization and capabilities essentially complete. The limits and consequences

[1] And see Reg. *v.* Brighton, 1 B. & S. 447.

[2] Ante, § 119, 120. In South Carolina it has been held, that a marriage between an uncle and niece is, under the statute of the State, voidable, not void. Bowers *v.* Bowers, 10 Rich. Eq. 551. So, in Pennsylvania, at least until 1860, Parker's Appeal, 8 Wright, Pa. 309.

[3] Shelford Mar. & Div. 179; Oughton, tit. 193, § 15.

[4] Ante, 110.

[5] G. *v.* G., Law Rep. 2 P. & M. 287, 291.

of this doctrine are now to be considered. We shall divide what is to be said as follows: I. A General View of the Doctrine; II. The Nature of the Impotence as to Procreation and Copulation; III. Further Specific Doctrines; IV. Legal Effect of the Impediment, and Statutes relating thereto.

I. *A General View of the Doctrine.*

§ 322. **Doctrine stated — Two Purposes of Marriage.** — "As the first cause and reason of matrimony," says Ayliffe, "ought to be the design of having an offspring; so the second ought to be the avoiding of fornication."[1] And the law recognizes these two as its "principal ends;" namely, "a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence."[2] When one knowingly marries a person past the age of childbearing, he cannot complain of the mere unfruitfulness.[3] And when the person is within such age, and has the power of copula, he cannot ordinarily show, as a matter of fact, that, at the time of the marriage, an incurable sterility existed. Indeed medical writers have said, without qualification, that such fact cannot be established,[4] — a proposition probably true in most or perhaps all cases where there is no discoverable malformation. Therefore, in the reported cases, the inquiry has chiefly been as to the ability to copulate. And when, from any cause irremediable, this sort of inability exists, the object of the marriage is frustrate. *Quia matrimonium ordinatum fuit*, says Oughton, *non solum ad evitandum Fornicationem, sed etiam ad proles procreandas; si Matrimonium (tale quale) fuerit, inter Virum et Mulierem, de facto, solemnizatum, qui omnino inhabiles sunt, non propter ætatem, sed propter aliquod naturale impedimentum, ad proles suscitandas, utpote, propter impotentiam et frigiditatem, maleficentiam, et similia, quæ ipso Jure, reddant hujusmodi matrimonium nullum. Hæc impedimenta naturalia aliquando contingant, tam in Muli-*

[1] Ayl. Parer. 360.

[2] Dr. Lushington, in Deane *v.* Aveling, 1 Robertson, 279, 298; Lord Stowell, in Briggs *v.* Morgan, 3 Phillim. 325, 1 Eng. Ec. 408, 409. And see the observations of Dr. Lushington in B. *v.* B., 28 Eng. L. & Eq. 95; s. c. in all its stages, 1 Spinks, 248.

[3] Brown *v.* Brown, 1 Hag. Ec. 523, 3 Eng. Ec. 229.

[4] Guy Forensic Med. Harper's Am. ed. 51.

ere, quam in Viro, — et pars gravata agere potest in causa nullitatis matrimonii.[1]

§ 323. **Impotence viewed as Fraud — Mistake — Warranty.** — The contract of marriage, therefore, implies that the parties are capable of consummating it.[2] And when an impotent person, knowing his defect, induces a person not cognizant of it to marry him, he commits thereby a gross fraud and a grievous injury;[3] and, even if himself ignorant of it, there is equally a violation of the contract, and equally an injury, though without intentional wrong. In the former case, the marriage would be clearly voidable on the sole ground of fraud, if the principles governing ordinary contracts were applied to it; in the latter case, it would seem to be equally voidable on the ground of mistake, and the violation of the implied warranty.[4] But owing to the peculiar nature of marriage, this infirmity, though sometimes treated of as a pure fraud,[5] is, according to the better opinion, to be regarded in a somewhat different aspect,[6] yet as presenting some of the elements of fraud; and we shall have occasion to see, particularly when we come to treat of the procedure in our second volume, that in several respects the rules relating to fraud in marriage are not applicable here.

§ 324. **How defined.** — This matrimonial impediment is termed impotence or impotency. A perfectly accurate and unexceptionable definition of it may not be readily given; in Mr. Shelford's work it is said to "consist in the incapacity for copulation, or in the impossibility of accomplishing the act of procreation."[7] Fraser defines it as the "incapacity of either

[1] Oughton, tit. 193, § 17.

[2] Poynter Mar. & Div. 123; Shelford Mar. & Div. 201; Oughton, tit. 193, § 17; Chitty Med. Jurisp. 378.

[3] Briggs *v.* Morgan, 3 Phillim. 325, 1 Eng. Ec. 408, 410.

[4] Ante, § 116, 167, 206. Rutherforth puts the doctrine thus: "This contract, like all others, is binding conditionally, so that a failure of performance on one part releases the obligation of the other part. Impotency, therefore, on the part of the man, or incapacity on the part of the woman, will set the contract aside. The man and the woman have, in words, made over a right to their persons respectively for the purposes of marriage; but making over the right is, in effect, making over nothing, where one is impotent or the other incapable." Ruth. Inst. b. 1, c. 15, § 9. See also Rogers Ec. Law, 2d ed. 640.

[5] Benton *v.* Benton, 1 Day, 111; Guilford *v.* Oxford, 9 Conn. 321, 327.

[6] Burtis *v.* Burtis, 1 Hopk. Ch. 557; Perry *v.* Perry, 2 Paige, 501.

[7] Shelford Mar. & Div. 202.

spouse for the act of copulation, or, as some think, the want of power to procreate children." [1] Probably a better definition is, that *impotence is such an incurable incapacity as admits of neither copulation nor procreation.* Let us look at some of these points more in detail.

II. *The Nature of the Impotence as to Procreation and Copulation.*

§ 325. **Scotch Doctrine — Doctrine of Canon Law.** — Mr. Fraser says, the question is yet undetermined in Scotland, whether the husband's want of power *seminandi* constitutes impotence, while he has the *potentia copulandi;* and, on the other hand, whether a woman with the latter power, but utterly barren, is to be held as impotent.[2] But the burden of the complaint in most of the cases he refers to, is the inability to beget children. And he adds: "The 98th constitution of Leo, the Philosopher, expresses at great length the utter abhorrence of the Emperor at the doctrine, that the *potentia copulandi*, without the power of procreating children, was sufficient. The most eminent commentators on the canon law are of the same opinion. Brower argues the point with great warmth, holding, as his leading principle, that marriage is not instituted for the satisfying of lust, or the exciting of passion, but for the begetting of children.[3] In a late criminal case, as to whether *emissio* was necessary to constitute the crime of rape, Lord Medwyn is reported to have said, that he held the *potentia copulandi*, without the *potentia seminandi*, to form a good defence to an action of nullity on the head of impotency.[4] This must, however, be a misreport, as the opinion is based on that of Sanchez, which is entirely opposite; for that learned canonist holds it to be impotency if a woman was *ita arcta ut mater esse non potest.*[5] A quotation is professed to be made in the report from Sanchez; but there is no reference given, and the words quoted seem to be those employed by Sanchez to designate the views of authors that he condemns." [6]

[1] 1 Fras. Dom. Rel. 53.

[2] Ibid.

[3] Brower, 2, 4, 10.

[4] Lord Advocate *v.* Robertson, 12 Mar. 1836. Just. Rep. Coll. App.

[5] Sanchez, 7, 92. Nos. 7, 8, 11, and 2, 21, 5, and 7, 96, 7. In these passages, Sanchez repeats very strongly the doctrine laid down in the text.

[6] 1 Fras. Dom. Rel. 53–55. See also,

§ 326. **English Doctrine.** — In the year 1845, there came before Dr. Lushington, sitting in the Consistory Court of London, a case which sheds no uncertain light concerning the views of this learned judge on the subject. It was a suit instituted by the husband against the wife, on the ground of her alleged impotence. The proof was, that the woman, as certified by the examiners, was capable of performing the act of generation, and of being carnally known by man, but conception could not follow. This statement of the facts was held to fall entirely short of what was required. "Mere incapability of conception," said the judge, "is not sufficient ground whereon to found a decree of nullity, and alone so clearly insufficient that it would be a waste of time to discuss an admitted point. The only question is, whether the lady is or is not capable of sexual intercourse; or, if at present incapable, whether that incapacity can be removed."[1]

§ 327. **Continued.** — But the case being peculiar, the testimony of the examiners was then taken, and the facts were found to be substantially as follows: the external sexual organs, and the development necessary to the creation of sexual desire and gratification, were perfect; but the vagina was contracted in depth, admitting of penetration to perhaps less than half the usual extent, and becoming impervious at that depth, where it formed a *cul de sac* with no communication to any of the internal organs. There was an entire absence of the uterus. The defect had improved slightly between the first and final examinations; but it was deemed incurable, and not capable of any material further improvement. The only impediment, therefore, as far as copula was concerned, was in the restricted depth to which penetration could extend; and, from the imperfect intercourse permissible, actual emission could ensue. Upon these facts, and solely because no complete copula could take place, the marriage was set aside. The learned judge remarked: "Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial or imperfect intercourse; yet I cannot go the length of saying that every degree of imperfection would deprive it of its

as to the Scotch law, Robertson's Case, 1 Swinton, 93.

[1] Deane *v.* Aveling, 1 Robertson, 279.

essential character. There must be degrees difficult to deal with; but, if so imperfect as scarcely to be natural, I should not hesitate to say, that, legally speaking, it is no intercourse at all. I can never think that the true interests of society would be advanced by retaining within the marriage bonds parties driven to such disgusting practices. Certainly it would not tend to the prevention of adulterous intercourse, one of the greatest evils to be avoided." [1]

§ 328. **Continued.** — The learned judge added: "If there be a reasonable probability, that the lady can be made capable of *vera copula*, of the natural sort of *coitus*, though without the power of conception, I cannot pronounce this marriage void. I will briefly state the reasons. In the case first supposed the husband must submit to the misfortune of a barren wife, as much when the cause is visible and capable of being ascertained, as when it rests in indiscoverable and unascertained causes. There is no justifiable motive for intercourse with other women in the one case more than in the other. But when the *coitus* itself is absolutely imperfect, and I must call it unnatural, there is not a natural indulgence of natural desire; and almost of necessity disgust is generated, and the probable consequences of other connections, with men of ordinary self-control, become almost certain. I am of opinion, that no man ought to be reduced to this state of *quasi* unnatural connection, and consequent temptation; and therefore I should hold the marriage void. The condition of the lady is greatly to be pitied, but on no principle of justice can her calamity be thrown upon another." [2]

§ 328 *a*. **American Doctrine — Maryland.** — It is believed that there is no American doctrine differing from this. Indeed, there is a Maryland case in which the facts were of the like sort, and they were held to be sufficient. In the language of

[1] Deane *v.* Aveling, 1 Robertson, 279, 298. And see, for facts very similar, B. *v.* B. 28 Eng. L. & Eq. 95; s. c. in all its stages, 1 Spinks, 248. In the case of Lewis *v.* Hayward, 4 Swab. & T. 115, reversed by the House of Lords, 35 Law J. N. S. P. & M. 105, there was evidently a partial and imperfect penetration, indeed both parties seemed at first to think it all right, and they even received medical advice to be more moderate in their intercourse, but this was not deemed to be *vera copula*, and a divorce for impotence was ultimately granted.

[2] Deane *v.* Aveling, 1 Robertson, 279, 299.

Bartol, C. J., it appeared "that the physical condition of the appellee (the woman) at the time of the marriage, was that of a very imperfect development of the sexual organs, both externally and internally. These organs were in a rudimentary condition, evincing that their development had ceased and been arrested before the age of puberty. She had never experienced the monthly sickness to which females of mature age are subject; and was without the natural passion or desire incident to woman. The rudimentary condition of her sexual organs, and their imperfect development, not only rendered conception impossible, but there was on her part an incapacity for *vera copula*. That is to say, she was not capable of the act of generation in its natural and ordinary meaning, but only of incipient and imperfect coition." [1]

§ 329. **How in Principle.** — It is difficult to say that, on the whole, the foregoing views are not correct in principle, while clearly they are in authority. Still, on the question whether, not in a case of mere barrenness, but of the absence from the person of the woman of those parts of the organism which are essential to maternity, while yet something like *vera copula* may be practicable, this should not be deemed ground of divorce, there is something to be considered. If the woman were past the age of child-bearing at the time of the marriage, this could not be complained of by the man; [2] but, if her years were such as to render offspring probable, and if, as to offspring, she was not really a woman, though she was such as to *copula*, and especially if she knew her defect and concealed it, there might, on principle, be some reason for holding the marriage to be voidable. Probably such cases are rare in fact, and the instances would be still more rare in which the proofs could be made.

§ 330. **Impotence of Copula, but not of Procreation.** — If the doctrine suggested in the last section were adopted, it would give to this matter of impotence a less gross and sensual aspect than otherwise it must wear. But, be it adopted or not, what shall be done with another class of cases; where, for example, an extreme brevity of the vagina, admitting of penetration to even a less extent than in the instance adjudi-

[1] G. *v.* G., 33 Md. 401, 405.

[2] Post, § 333.

cated by Dr. Lushington, and occasioning pain in the act of imperfect copula, is connected with a perfect uterus, and complete capacity for conception;[1] or where the man, before marriage, suffered an amputation, and so only slight penetration, much less than what Dr. Lushington terms "ordinary and complete intercourse," can take place, yet conception may follow? For it is well known, that women have become pregnant under such circumstances, and in others where even the hymen has not been ruptured.[2] Perhaps Dr. Lushington would have said, that a divorce, after the birth of issue, could not be granted; since one of the ends of marriage had been attained,[3] and the offspring should not be bastardized. And, on principle, why should not this be so, even though no issue had in fact been born, at the time of application made to the court? But if mere copula is to be deemed the end of marriage, it follows that there can be no marriage where it is impossible, and cases would occur in which there would be perfect power of conception or procreation, yet still the marriage, on this theory, must be held void. In a late English case before the House of Lords, where the wife was petitioner, and it appeared that she had represented herself to have miscarried three times, as probably she erroneously supposed she had done, while yet the hymen was shown not to be broken, Lord Chelmsford observed: "If a miscarriage actually took place, whatever appearances the person of the appellant may have exhibited, and however imperfect the intercourse may have been, there is of course an end of the appellant's case."[4]

III. *Further Specific Doctrines.*

§ 331. **Defect in either Spouse — How numerous the Cases — How viewed.** — The cases of impotence are not numerous in fact; but, when they arise, they require careful consideration, and an accurate understanding of the law. The defect may be either in the man or the woman; being equally, in each, a subject of legal redress. Lord Stowell, in 1820, remarked, accord-

[1] 1 Beck Med. Jurisp. 10th ed. 107.
[2] Dean Med. Jurisp. 6–8.
[3] See 1 Bl. Com. with notes by Chitty and others, 440.
[4] Lewis *v.* Hayward, 35 Law J. N. s. P. & M. 105, 107.

ing to one report of his observations, that three suits only had been brought by the man within the last sixty years, and that these had been unsuccessful, as was also the suit then before him.[1] Sir John Nicholl said, in the same year, sitting in the Court of Arches, that there had been but one suit by the husband within his recollection.[2] But when these cases come, the courts are to administer the law in them the same as in any other. "Courts of law are not invested with the power of selection; they must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the most odious nature, where the proceeding is only for the punishment of the offender; here the claim is for a remedy, and the court cannot refuse to entertain it, on any fastidious notions of its own."[3]

§ 331 *a*. **Continued.** — Since the foregoing observations were originally made, divorces for impotence have become more numerous in England than they were then, and it is believed that the same is true in our own country. In England, the present Divorce Court was established, as we have seen,[4] in 1858, and the Reports by Swabey and Tristram, and the Law Reports, down to and including the year 1872, contain fifteen reported causes of this sort; in eight of which the wife was applicant for divorce by reason of the alleged impotence of the husband, in four the husband was petitioner against the wife, in one the husband sued for adultery and the wife unsuccessfully resisted the suit by setting up his impotence, in one the wife sued the husband for cruelty and he showed in answer her impotence and obtained a decree of nullity for it, and in one

[1] Briggs *v.* Morgan, 3 Phillim. 325, 1 Eng. Ec. 408. But on this point the report of the case in 2 Hag. Con. 324, 326, is somewhat different. According to the latter report, the learned judge said: "Cases of this kind, brought by the husband against the wife, are certainly not very frequent; it is said that there have not been more than two instances established by proof in sixty years, which it requires no very deep philosophy to account for." And see Devanbagh *v.* Devanbagh, 5 Paige, 554, 557.

[2] Norton *v.* Seton, 3 Phillim. 147, 1 Eng. Ec. 384, 386.

[3] Lord Stowell, in Briggs *v.* Morgan, supra; Harris *v.* Ball, cited 2 Hag. Con. 327. Still, the court, in consideration of the peculiar character of the proofs, will not be disposed to encourage these suits brought without necessity. Lord Stowell, in Guest *v.* Shipley, 2 Hag. Con. 321, 4 Eng. Ec. 548. And see 1 Greenl. Ev. § 253.

[4] Ante, § 65.

it was attempted to prevent a husband from administering on the effects of his deceased wife by showing him to have been impotent during the marriage. One cause of the increase of these cases is undoubtedly the greater facility of making proofs, in consequence of the statutes which permit parties to be witnesses. "Before the law of evidence was altered by admitting both parties to tell their own tale," observes Lord Penzance, "the matrimonial tribunal stood in a very different position from what it now occupies in relation to cases of this delicate and critical character. Except the answer upon oath of the accused party, the sole means of judgment were the outward and bodily signs revealed on medical inspection. This condition of things had at least one merit, if it had greater defects. Its merit lay in this, that it became very difficult for a woman to approach the court, save with those cogent signs of virginity which constituted reliable proof that the marriage had really never been consummated. And this was surely a merit; for it saved the court from possible imposition upon this fact, and limited the number of suits to those rare cases in which, from some cause or other, no sexual intercourse had taken place."[1] In most of the modern cases in which the defect is in the man, it has proceeded from some weakness produced perhaps by self-indulgence;[2] then, if the woman was a widow at the time of the marriage, or if from any cause she is wanting in the signs of virginity at the time when she asks the relief of the court,[3] it becomes difficult for her to

[1] F. *v.* D., 4 Swab. & T. 86, 92, 93.

[2] Of the fifteen cases mentioned in the text, there is, I think, no one in which the fact appeared that there was any defect in the man visible to inspection. In some, the wife had a divorce for his inability, though the evidence of the inspectors was quite distinct in affirming his apparent power; for example, in M. *v.* H., 3 Swab. & T. 517, 520, 522, "organs of generation perfectly healthy, rather more than usually vigorous in dimensions and appearance," yet the woman was found to be a virgin after three years cohabitation, and to be apt, and the court granted her a divorce.

[3] It is well known that, in many instances, the signs of virginity are uncertain, even where virginity in fact exists. I have looked through the eight cases mentioned in the text, wherein the wife was the petitioner; in H. *v.* C., 1 Swab. & T. 605, the signs of virginity were destroyed, but she was able to show that it had occurred in a course of medical treatment; in S. *v.* E. 3 Swab. & T. 240, a medical witness who examined the woman "believed she is a virgin, but it is a difficult question, in some cases you cannot be mistaken, in others you may;" in M. *v.* H., 3 Swab. & T. 517, there was a "perfect hymen;" in M. *v.* B., 3 Swab. & T.

make out her case, however just in itself, where the former rules prevail. But, when both parties can be examined on oath before the court, the difficulty in a great measure disappears, and the path to justice is more open and plain. Perhaps, also, there is among the mass of people less sensitiveness about agitating causes of this nature now than formerly.

§ 332. **Must exist at Marriage — Incurable — Surgical Operation.** — Impotence, to be a ground of divorce, must exist at the time of the marriage. A sentence for this cause declares the marriage void from the beginning,[1] which it could not do if the matter occurred subsequently to the nuptials. Though a party should become impotent after marriage, as the effect of incontinence before, still the marriage is good, the impediment not existing when it was entered into.[2] So also the defect must be incurable.[3] And the burden of proof, in the suit, is on the plaintiff to establish both that it existed at the time of the marriage, and that it is incurable.[4] When it is a natural defect, the legal presumption is, that it existed at the time of marriage solemnized; when it is accidental, the contrary presumption seems to arise.[5] When there appears a probability of capacity, or when the impediment which had existed is removed, the court cannot declare a nullity.[6] And if the impediment is of a nature to be removed without serious danger, by a surgical operation which the party refuses to undergo, still it cannot lay the foundation for a divorce on the

550, "a hymen;" in F. *v.* D., 4 Swab. & T. 86, the inspectors of the wife "cannot determine whether she is a virgin;" in L. *v.* H. 4 Swab. & T. 115 (reversed 35 Law J. N. S. P. & M. 105), "a hymen;" in T. *v.* D., Law Rep. 1 P. & M. 127, "the physical appearances are, to say the least, consistent with the consummation of the marriage;" in U. *v.* J., Law Rep. 1 P. & M. 460, the same. Then, again, according to medical testimony in one case, the marriage may have been consummated, and still the hymen remain. L. *v.* H., 4 Swab. & T. 115.

[1] Ante, § 105, 112, 118, 322, 323.

[2] Belcher *v.* Belcher, reported in a separate volume by Phillimore, June 6, 1835; Bascomb *v.* Bascomb, 5 Fost. N. H. 267.

[3] Ferris *v.* Ferris, 8 Conn. 166; Anonymous, 35 Ala. 226, 229; Bascomb *v.* Bascomb, 5 Fost. N. H. 267; G. *v.* G., 33 Md. 401. And see Norton *v.* Norton, 2 Aikens, 188.

[4] Brown *v.* Brown, 1 Hag. Ec. 523, 3 Eng. Ec. 229; Newell *v.* Newell, 9 Paige, 25; Devanbagh *v.* Devanbagh, 5 Paige, 554; Welde *v.* Welde, 2 Lee, 580.

[5] Godol. Ab. 494; Sanchez, lib. 7 disp. 103, n. 4; Shelford Mar. & Div. 204.

[6] Welde *v.* Welde, 2 Lee, 580, 586; Devanbagh *v.* Devanbagh, 6 Paige, 175; 1 Fras. Dom. Rel. 55.

ground of impotence; since such a rule would enable the faulty one to be impotent or capable, to make the marriage void from the beginning or good, at his election.[1] So it has been held, and perhaps correctly, on the bald case thus put; but, in some late English cases, where the facts were not quite as thus stated, yet nearly so, the question is deemed to be a practical one, whether or not the complaining party can so influence the other as to cause the impediment to be removed. Thus, in an English case heard by Sir C. Cresswell, the late judge ordinary, the result of the evidence was, as observed by the learned judge, "that the obstruction [in the woman] was congenital, and that it might possibly be removed by a surgical operation; that such an operation would in this case, the woman being forty-nine years of age, be attended with considerable danger to her life, and the success of it, with regard to the result to be obtained, doubtful." The judge proceeded: "What course is to be taken? The report of the medical inspectors was made known to her advisers; she has not expressed any desire to undergo an operation, and the court can hardly assume, under the circumstances of this case, the existence of any such desire. It was said that the petitioner ought to have called upon her to do so; no precedent for such a proceeding has been suggested, and I am not disposed to make one. The petitioner may with great propriety decline proposing that the respondent's life should be placed in danger; she must judge for herself; and, there having been no prayer for delay on her part, I think it my duty to proceed with the case on the assumption that things will remain as they are."[2] In a still later case, not where a surgical operation was required, but medical treatment, and the woman had taken some of the prescribed remedies but others she refused to take, alleging that they would injure her health, Lord Penzance granted a divorce. "The result of my examination of" the woman, said a medical expert, "is, that in my opinion sexual intercourse is practically impossible. There are means by which, in my opinion, her condition may be remedied; but, in order that they should succeed, it is necessary that she should lend herself to them. If

[1] Devanbagh *v.* Devanbagh, 6 Paige, 175; 1 Fras. Dom. Rel. 55.

[2] W. *v.* H., 2 Swab & T. 240, 244, 245.

she were to return to cohabitation, and were to refuse to take chloroform and the other remedies prescribed, I think there could be no consummation." Upon this the learned judge observed: "It is unquestionable that these two people, neither of them advanced in life, have slept together for two years and ten months, and that the marriage has never been consummated. Without speculating on the abstract causes of this state of things, or on the remedies which might possibly be applied to it; but, taking the case as it stands, the court cannot help perceiving that there must be some strong cause rendering consummation impracticable. The question is, whether that cause is of such a character that it can practically be regarded as permanent. . . . . It cannot be necessary to show that the woman is so formed that connection is physically impossible, if it can be shown that it is possible only under conditions to which the husband would not be justified in resorting. The absence of a physical structural defect cannot be sufficient to render a marriage valid if it be shown that the connection is practically impossible, or even if it be shown that it is only practicable after a remedy has been applied which the husband cannot enforce, and which the wife, whether wilfully or acting under the influence of hysteria, is determined not to submit to. The question is a practical one, and I cannot help asking myself what is the husband to do in the event of his being obliged to return to cohabitation in order to effect the consummation of the marriage? Is he by mere brute force to oblige his wife to submit to connection? Every one must reject such an idea."[1] Again, in cases where the wife is the applicant for divorce, and the impotency of the husband proceeds from self-abuse which may be cured by his exercising moral restraint over himself, yet not otherwise, and he will not exercise such restraint, this sort of curability, it would seem, is not deemed to take away her right to the divorce.[2] That these views by the English courts are sound, it appears to the writer no argument is required to show.

§ 333. **Origin of Impotence — Woman past Age of Childbearing.** — The origin of the impotence is unimportant. Suppose

[1] G. *v.* G., Law Rep. 2 P. & M. 287, 289–291. And see post, 338 *a*.

[2] See and compare S. *v.* E., 3 Swab. & T. 240; F. *v.* D., 4 Swab. & T. 86.

it not to be connate, but to have come, subsequently to the birth of the impotent party, from accident or otherwise: still, having existed at the time of the marriage, it has the same effect as if it had always existed.[1] A qualification of this rule was intimated, *arguendo*, in two English cases, to the extent, that, if a man marries an old woman, naturally capable, yet past the age of childbearing, with a supervening impediment to consummation, which has come as a disorder peculiar to advanced years, the court will not interfere for his relief. This qualification, if admitted, must be deemed a branch of the general doctrine, that a man shall not complain of what he knew, or had reason to suspect, at the time of the marriage. The primary object of matrimony being the procreation of issue, "a man," in the language of Sir John Nicholl, "of sixty, who marries a woman of fifty-two, should be contented to take her *tanquam soror*." "*Subeunt morbi*," says Lord Stowell,

[1] Ayl. Parer. 228; Chancellor Walworth, in Devanbagh *v.* Devanbagh, 5 Paige, 554, 557; Essex *v.* Essex, 2 Howell St. Tr. 786, 795, 804, 849, 857. This latter case, usually cited as the Countess of Essex's, or the Earl of Essex's Case, though perhaps of doubtful authority as to the point more directly involved in it (see post, § 335), is quite conclusive of the doctrine stated in the text. For the twelve commissioners who heard the case, among whom were the most able and learned doctors of the age, concurred in the opinion, that it was immaterial whether the defect were natural, or superinduced "by accidental means;" and even the Archbishop of Canterbury, rampant in his opposition to the conclusion of the majority of the commissioners on the principal point, still employed, in his "*speech intended to be spoken*," the following language: "There are three sorts of eunuchs, or men unfit to marry; the one is of God's making, the second is of man's making, and the third is of their own making. The first are they that are past from their mother's belly, who either are *frigidi*, or such as have no members fit for generation, or some apparent debility. The second are those who are castrated by men, or by some violence have that hindered in them, whereunto, by nature, they are fit in respect of procreation. The third hath no coherence with this nobleman." p. 857. He also said, that the impediment in Bury's Case was having the testicles "stricken off with an horse," p. 849. No complaint was ever made with the law of Bury's Case; but the marriage was deemed *voidable* (not void, as this learned person erroneously stated it), on the ground of the church, as it afterward appeared, having been deceived concerning the fact of the impotence. As to Bury's Case, see also ante, § 113. In Waddilove's Digest, p. 198, note, is a reference to Morris *v.* Morris, cor. Del. May 15, 1833, Printed Cases, vol. ix. p. 91, as "a lengthened and extraordinary case of a suit for nullity of marriage, by reason of the man's impotence *superinduced by malpractices in youth*; in which, however, the charge was held not sufficiently proved, and the man dismissed, but condemned in costs." I have not been able to obtain the volume referred to, and can therefore give no further account of this case.

"is the natural description of late periods of life; and disorders, when they do come at such periods, must be borne with." [1]

§ 334. **Past Age of Child-bearing, continued.** — And there is a late English case, which seems to have utterly exploded the doctrine, if it ever existed, that parties past the age of procreation shall therefore be deprived of the benefit of this branch of the matrimonial law. A man of fifty-four married a woman of forty-nine, and the court granted him a sentence of nullity on the ground of her impotence. Alluding to the two cases referred to in our last section, the learned judge ordinary, Sir C. Cresswell, observed: "But the decision [distinguishing the decision from the dicta] did not, in either of those cases, turn upon the age of the parties, but on the merits; nor can I find any case in which it did. . . . . I think I must take the same course here." [2]

§ 335. **Impotence versus Hanc.** — If, as a matter of physiological truth, the possibility of a man being totally and incurably impotent as to one woman, while capable as to others, is admitted [3] (and the writer is disposed neither to admit nor to deny this proposition as respects *copula;* as respects *procreation* it is undoubtedly true), the question may again arise, as it did in 1613, whether "impotency *versus hanc*," as it was termed, is sufficient to annul the marriage. In that year, the Countess of Essex, on petition to James I., obtained from him

[1] Briggs *v.* Morgan, 2 Hag. Con. 324, 331, 3 Phillim. 325, 1 Eng. Ec. 408, Brown *v.* Brown, 1 Hag. Ec. 523, 3 Eng. Ec. 229. There seems to have been some difficulty in understanding this latter case. That part of the reporter's note which relates to the point under discussion is as follows: "*Semble*, that an impediment not natural, but supervening, is no ground of nullity." In Waddilove's Digest, p. 197, it is "*Semble*, that an impediment supervening after marriage is not a ground of nullity." Evidently neither of these dissimilar statements approximates the idea really intended by the court.

[2] W—— *v.* H——, 2 Swab. & T. 240, 244.

[3] Guy Forensic Med. 60. Impotence "may be either *absolute* or *relative*. In the first, there is a total incapacity; in the second, the incapacity exists only as between particular parties." Dean Med. Jurisp. 4. In a late English case, Dr. Lushington gave in his adherence to this doctrine of impotence *versus hanc;* at least, to its legal sufficiency, if proved. He considered, that it alone is shown whenever the sole evidence is of non-consummation, after the cohabitation of three years. Anonymous, 22 Eng. L. & Eq. 637; s. c. *nom.* N. *v.* M., 2 Robertson, 625; s. c. *nom.* A. *v.* B., 1 Spinks, 12. So also, by implication, Cresswell, J., in H. *v.* C., 1 Swab. & T. 605, 615.

a commission,[1] addressed to twelve of the principal bishops and doctors of the ecclesiastical law, to hear her complaint against her husband for his impotency. Her libel alleged, that there had been a triennial cohabitation; that she was *apta viro*, and *virgo intacta;* that the earl was wholly impotent and unable to consummate the marriage, *as to her;* though, both before and since the nuptials, he had "power and ability of body to deal with *other women*, and to know them carnally." The earl, in his answer, admitted the non-consummation; said he neither could nor would consummate the marriage; insinuated that the difficulty was with her; and set forth, following what she in her libel had alleged, his power with other women. The proofs established the marriage and triennial cohabitation; while also the midwives and noble matrons, who, by appointment of the court, examined the lady's person, reported her to be a virgin, yet with abilities for copula and fruitfulness. Here was sufficient evidence, at least *primâ facie*, to show entire impotence in the earl; but the peculiar allegation in the libel forbade this view, and the question was, whether a divorce could be granted, assuming the impotence to extend only *as to her*. The royal influence was exerted powerfully in favor of the divorce; but the commissioners were still divided in opinion. At last, five of them absented themselves, leaving the other seven, whose judgments favored the divorce, to enter the decree. As to the facts of this case, the countess is said to have obtained leave, under the pretence of modesty, to put on a veil when about to be inspected, and to have then substituted a young woman of her own age and stature, dressed in her clothes, to stand the search in her stead; whereby she deceived the matrons and the court. On the other hand, room may exist for doubt, whether the allegation of "impotence *versus hanc*" was not a device to save the feelings and reputation of the earl; since, though he ventured on a second marriage, he had no issue.[2]

§ 336. **Classifications of Impotence.** — Writers on medical

[1] "The court of the king's *high commission*, in causes ecclesiastical, was erected and united to the regal power by virtue of the statute 1 Eliz. c. 1, instead of a larger jurisdiction which had before been exercised under the pope's authority." It was abolished by Stat. 16 Car. 1. c. 11. 3 Bl. Com. 67, 68.

[2] Essex *v.* Essex, 2 Howell St. Tr. 786; and ante, § 333, note.

jurisprudence have made differing classifications of impotence, in accordance with their differing tastes; but these classifications are of little practical importance to the lawyer, none of them being drawn on true legal distinctions.[1] What the lawyer wants is to see the lines separating those impediments which somewhat obstruct, but do not prevent, copula, from those which sufficiently hinder it to lay the foundation for divorce; separating also the curable and the incurable; and separating those defects which are discoverable on inspection, from those which can be ascertained sufficiently only on special evidence of actual inability, or a triennial cohabitation.

§ 337. **Forms of Impotence.** — Neither can we know, in advance, what forms this impediment of impotence may assume in the future.[2] Ayliffe, who wrote more than a century ago, says, that impotence in the man is an excess of frigidity; in the woman, too great a straitness in her genital parts;[3] yet we now know, that these are only examples of impotence, and that it has assumed numerous other forms. The reader will find, on this subject, much information in the treatises upon medical jurisprudence, particularly in the late enlarged edition of Dr. Beck's work. Chancellor Walworth has perhaps well remarked, on the authority of this writer, that the instances of absolute and incurable impotence are few; that the defect is generally palpable to the senses; and that, of cases formerly assigned to this class, many have given way before the modern improvements in surgery.[4] And his conclusion is just, that courts should proceed in these causes of impotence with the greatest vigilance.[5]

§ 338. **Peculiar Case — Excessive Sensitiveness.** — There was

[1] Dr. Beck divides the "*causes* of impotence," after the manner of Foderé, into "*absolute, curable,* and *accidental, or temporary;*" which is somewhat convenient for legal contemplation. 1 Beck Med. Jurisp. 10th ed. 88. Dr. Guy classifies impotence in the male as, 1. Physical; 2. Moral or Mental. Under the first head he has *a.* Age; *b.* Malformation or defect of the penis; *c.* Defect or disease of the testicles; *d.* Constitutional disease or debility. Guy Forensic Med. 52. Impotence in the female he classifies as, 1. Narrowness of the vagina; 2. Adhesion of the labia; 3. Absence of the Vagina; 4. Imperforate hymen; 5. Tumors occupying the vagina. Ib. 60. A similar classification is adopted by Dean.

[2] 1 Beck Med. Jurisp. 10th ed. 100.

[3] Ayl. Parer. 227.

[4] But see ante, § 331 *a* and notes.

[5] Devanbagh *v.* Devanbagh, 5 Paige, 554, 557. See Pollard *v.* Wybourn, 1 Hag. Ec. 725, 3 Eng. Ec. 308.

a case in Massachusetts so novel, that, since it has not found its way into the reports, it may properly be stated here. A husband proceeded against his wife for divorce, alleging her impotence. There was no obstruction, outwardly appearing, to the consummation of the marriage; but there was an intense sensitiveness in all the sexual region, so intense that any pressure there, even external, produced a degree of pain and suffering which she was unable to endure. She was evidently not aware of her condition until after the marriage; and then she gave what consent she could to the unsuccessful embraces of her husband, until, becoming convinced that the marriage could not be consummated without danger to her life, she left him. She made no resistance to his application for divorce, and acceded to whatever measures were necessary to bring the proofs before the court. The parties were respectable, and there was no doubt of the facts. The case was heard by Fletcher, J., who, after reading from his minutes the evidence to the other judges, gave, with their concurrence, sentence for divorce.[1]

§ 338 *a*. **Another like Case.** — Another case, quite analogous, in which the above case as here reported was brought to the attention of the court, has occurred in England. A wife having sued her husband for cruelty, he replied alleging nullity of the marriage by reason of her impotence, and obtained sentence of divorce against her on the following facts. There was no malformation or structural defect, but she suffered from an excessive physical sensibility. There was a question whether or not this condition was curable, but that is stated in a previous section.[2] The man was of undoubted ability, and made frequent attempts, but the marriage was never consummated. "There is no doubt," said Lord Penzance, "that this man and woman have lived together and slept together for two years and ten months. That is a material fact, because many difficulties of this peculiar nature, especially those which are associated with the moral feelings, pass away as time goes on. But here there

[1] Supreme Judicial Court for Suffolk, March T., 1850. I am indebted to the kindness of Judge Fletcher for a statement of the facts of this case.

[2] Ante, § 332.

has been nearly three years' cohabitation, and therefore ample opportunity has been afforded for any merely temporary difficulty to pass away. It sometimes happens that a nervous condition has prevented consummation at first; but such a condition would be removed in the course of time, and the length of the cohabitation therefore affords a strong basis for the conclusion at which the court ought to arrive. . . . No one can dive into the future and say that no change may hereafter take place in the woman; but the same remark applies even to a case of structural deformity. No one knows what may happen, for unforeseen things happen daily."[1]

§ 338 *b*. **Deed of Separation.** — It has been held that a deed of separation between a husband and his wife, is not a bar to a *bona fide* application for divorce on the ground of impotence existing at the time of the marriage.[2]

IV. *Legal Effect of the Impediment, and Statutes relating thereto.*

§ 339. **Voidable — The Statutes.** — We hardly need add, that impotence is a canonical impediment, rendering the marriage voidable, not void.[3] Still, plain as this proposition is, it was denied in the English Probate Court in 1868, by parties who, on a wife's death, sought to resist the husband's claim to admininister on her estate, alleging the marriage to have been *void* by reason of his impotence. But the court refused to accede to this view, the learned judge observing "that the practice of the courts, both temporal and spiritual, from all time, has been inconsistent with the attempt now made, and that it is not supported by a single authority."[4] Therefore until sentence passed, in the lifetime of both the parties, the marriage is perfectly good; but the sentence makes it void from the beginning. The statutes generally of the States of this country mention impotence as a ground of *divorce*, without saying whether the decree of divorce operates to annul the marriage as from the beginning, or only as from the date of its

[1] G. *v.* G., Law Rep. 2 P. & M. 287, 290, 292.

[2] G. *v.* G., 33 Md. 401.

[3] Elliott *v.* Gurr, 2 Phillim. 16, 19, 1 Eng. Ec. 166, 168; Poynter Mar. & Div. 123; Sneed *v.* Ewing, 5 J. J. Mar. 460; Smith *v.* Morehead, 6 Jones Eq. 360.

[4] A. *v.* B., Law Rep. 1 P. & M. 559, 563.

rendition; but it is plain that the principles of law applying to the case leave it here as it stands in England. The marriage was a voidable one; the sentence renders it void from the beginning.[1]

§ 339 *a*. **The Statutes, continued.** — The statutes on this subject are in different words; for example, in some of the States, the terms are "the impotence of either party at the time of the marriage."[2] In New Hampshire, "a divorce from the bond of matrimony shall be decreed for the following causes, in favor of the innocent party; impotency," &c. And it was held, that the impotence must exist at the time of the marriage, though the statute is silent on the point. Said Woods, J.: "When the legislature enacted the cause under consideration, we do not think they intended to adopt a different principle from that which had been recognized in England, and, perhaps we may safely say, in all other Christian countries, as establishing a just foundation for a dissolution of the bond of matrimony."[3] And this view, it may be added, accords with the general doctrine, that statutes are to be interpreted in harmony with the common law.[4]

§ 340. **The Procedure.** — There are, relating to this matter of impotence, some principles which may be treated of either in connection with the law of the subject, or of the procedure, as we may choose to regard them. The reader, therefore, should not deem his task done until he has perused the chapter relating to the procedure in these cases, to be found in our second volume.[5]

[1] Ante, § 96; Smith *v.* Morehead, 6 Jones Eq. 360; post, § 339 *a*.

[2] G. *v.* G., 33 Md. 401; Kempf *v.* Kempf, 34 Misso. 211.

[3] Bascomb *v.* Bascomb, 5 Fost. N. H. 267, 273.

[4] Bishop Stat. Crimes, § 114, 119, 124, 142, 144.

[5] Vol. II. § 574 *et seq*.

CHAPTER XX.

PENAL CONSEQUENCES OF WRONGFUL ACTS CONNECTED WITH THE SOLEMNIZATION OF MARRIAGE.

§ 341. **Penal Consequences, and Nullity of the Marriage, distinguished — Scope and Order of the Discussion.** — We have already seen, that, though the law may forbid a particular method of solemnizing marriage, yet, if parties disregarding the provision interchange with each other the mutual consent in any other form, this, according to the doctrine mostly prevailing in the United States, constitutes them husband and wife.[1] But penal consequences may nevertheless flow to themselves, and, if the marriage is by a clergyman or magistrate, to this officiating person. To trace minutely the laws of the several States on this subject would be unwise, yet the reader may derive some benefit from being referred to the decisions. They are of two classes, — those which inflict pains on the parties, and those which inflict pains on third persons connected with the celebration of the marriage. We shall, therefore, consider, I. Penal Consequences to the Parties; II. Penal Consequences to Third Persons.

I. *Penal Consequences to the Parties.*

§ 341 *a*. **Miscellaneous Views.** — There are not many statutes inflicting pains on the parties; except those which make it indictable in them to commit polygamy,[2] to marry after being divorced as the guilty party,[3] or to marry a person of another race or color,[4] and the like, — matters which have been already discussed in these pages. We have seen,[5] that, in Scotland,

[1] Ante, § 279, 283–287 *a*.
[2] Ante, § 296 et seq.
[3] Ante, § 304 et seq.
[4] Ante, § 308 et seq.
[5] Ante, § 287.

where informal marriages are common, the law imposes penalties on the parties for the informal solemnization; but, in our country, where they are less common, it is not within the knowledge of the writer that these penalties anywhere exist. It appears to be penal in North Carolina to marry a girl under fifteen years of age;[1] and perhaps an examination of the statute books of the several States would disclose other provisions of this general sort. If a statute makes the official persons who celebrate a particular marriage indictable, it may be a question whether the parties are not therefore indictable as aiding and abetting at the act. There appear to be no adjudications upon this point, and the doctrines governing it have been sufficiently unfolded by the author in his other books.[2]

II. *Penal Consequences to Third Persons.*

§ 342. **The Clergyman — Minors — Consent of Parents, &c. —** Those enactments which have come oftenest under review by the courts, are such as are framed for the purpose of preventing clergymen and others from joining minors in marriage without the consent of their parents or guardians. Thus in Arkansas it is provided, that "persons authorized by this act to solemnize marriages shall not perform any marriage ceremony of any male over the age of seventeen years and under the age of twenty-one years, nor of any female over the age of fourteen years and under the age of eighteen years, without the consent in person or in writing of the parent or guardian of such male or female minor, if they have either parent or guardian living in this State." And the construction put upon this enactment is, that, unless the parent or guardian is present at the solemnization of the marriage, the clergyman performing the ceremony must, to screen himself from the penalty provided for a breach of the law, have the actual written consent of the guardian or the parent; and he cannot excuse himself by showing, that he proceeded on a verbal message sent to him through a third person by the parent consenting.[3] And, in

[1] Ludwick *v.* Stafford, 6 Jones, 109.

[2] See, among other places, 1 Bishop Crim. Law, 5th ed. § 656–659, 685–689; Bishop Stat. Crimes, § 135, 140, 142, 145, 594, 662, 770, 771, 775, 1029; 1 Bishop Crim. Proced. 2d ed. § 332; 2 Ib. § 3, 5, 6, 14, 59.

[3] Smyth *v.* The State, 13 Ark. 696.

this class of statutes, it has been deemed not sufficient for the person indicted or otherwise prosecuted to show, in defence, that he acted in good faith, if he violated the letter of the law.[1] Thus, not only is he not protected when proceeding on a verbal authority, but he is bound to know, at his peril, whether or not the parent or guardian resides within the State.[2] To this very broad proposition there must be a certain qualification, depending on principles elsewhere discussed.[3]

§ 343. **Continued.** — We have seen, that, by the express words of the Arkansas statute, the prohibition to marry without the consent of parents or guardians is confined to cases in which the parent or guardian lives within the State. In Pennsylvania the same result has been arrived at by judicial construction of the enactment. Said Gibson, C. J.; "It is evident from the nature of the subject, and from the specific provisions for it, that the statute of 1729–30 was enacted for none but the inhabitants of the province. It is not the proper business of a government to legislate for the domestic relations of a foreign people. The laws of a country are made for the protection of those who owe a permanent or temporary allegiance to it; and where it interposes for the protection of strangers within the jurisdiction of its courts, it is by the courtesy of nations, and not of right; for protection and allegiance are correlative duties."[4] And a Vermont statute, requiring the consent of parents, was held not to be applicable where there was no parent living.[5]

§ 344. **Continued — Secret, &c.** — If the marriage was in secret, this was in one case in North Carolina deemed important on a question of the limitation of the time for finding an indictment.[6] In Missouri, a statute having forbid the marrying of any minor, without the consent of the parent or guardian, or other person

s. p. in New Jersey, Wyckoff *v.* Boggs, 2 Halst. 138. And see Bishop Stat. Crimes, § 237. As to the form of the indictment, see The State *v.* Willis, 4 Eng. 196; The State *v.* Ross, 26 Misso. 260; The State *v.* Winright, 12 Misso. 410. See also Roberts *v.* The State Treasurer, 2 Root, 381; White *v.* The State, 4 Iowa, 449.

[1] Smyth *v.* The State, supra.

[2] The State *v.* Willis, supra.

[3] Bishop Stat. Crimes, § 355–359, 1021, 1022, and the other sections there referred to.

[4] Bollin *v.* Shiner, 2 Jones, Pa. 205. As to the North Carolina statute on this point, see Caroon *v.* Rogers, 6 Jones, N. C. 240.

[5] Holgate *v.* Cheney, Brayt. 158.

[6] The State *v.* Watts, 10 Ire. 369.

having the care and government of such minor, this was held to limit the power of consent to the person having over the minor such care: consequently, if a minor has both a parent and a guardian, the guardian only can consent.[1] And under the Pennsylvania statute it was held, that, if the father has relinquished his parental control over his minor child, he cannot maintain an action against a justice of the peace for marrying such minor without his consent; yet, it is no defence to such an action that the father was by reason of moral degradation unfit to take care of such child.[2] The master of an apprentice, in this State, it was held, under the act of 1829–30, cannot support an action against a clergyman for marrying him contrary to the provisions of the act, unless the apprentice is bound to him by indenture.[3]

§ 345. **Continued — Marriage License.** — A statute in New Hampshire provides, that, "if any minister or justice of the peace shall join any persons in marriage, without having first received a certificate of the town clerk, as hereinbefore provided, he shall forfeit for each offence," &c. And it was observed, that "a certificate means one certificate;" consequently, if the parties reside in different towns, he is protected though he has a certificate from but one of the towns.[4] And it is also held, that a person who is neither a minister nor a justice of the peace cannot render himself liable under this statute.[5]

§ 346. **Filing Certificate for Record.** — In Indiana, it was provided as follows: "§ 15. Every person who shall solemnize any marriage by virtue of the provisions of this article, shall, within three months thereafter, file a certificate thereof in the clerk's office of the county in which such marriage was solemnized." "§ 20. If any person, having solemnized a marriage, shall fail or neglect to file a certificate thereof in the proper clerk's office, as in this article required, he shall,

[1] Vaughn *v.* McQueen, 9 Misso. 327.

[2] Robinson *v.* English, 10 Casey, 324. See Larwill *v.* Kirby, 14 Ohio, 1.

[3] Zieber *v.* Roos, 2 Yeates, 321. And see further, as to Pennsylvania, Mitchell *v.* Cowgill, 4 Binn. 20; Minor *v.* Neal, 1 Barr, 403; Buchanan *v.* Thorm, 1 Barr, 431. And as to Tennessee, see The Governor *v.* Rector, 10 Humph. 57. As to Alabama, see Cotten *v.* Rutledge, 23 Ala. 110.

[4] Wood *v.* Adams, 35 N. H. 32, 37.

[5] Bishop *v.* Marshall, 5 N. H. 407. As to South Carolina, see Watson *v.* Blaylock, 2 Mill, 351.

upon conviction thereof upon indictment in any court having competent jurisdiction, be fined the sum of five dollars for every month he shall continue to fail or neglect to file such certificate, from and after the expiration of the time within which he is required by this article to file the same." And it was held, that an indictment under this statute would not lie until a full month had run after the expiration of the three months; in other words, until four months had elapsed from the time when the marriage was solemnized;[1] also, that this statute does not create a distinct offence for every month which runs after the expiration of the three months.[2]

§ 347. **Disobeying Statute — Refusing to solemnize Marriage — Marrying Minor — Private Action — Indictment.** — Questions may arise as to the remedy, whether by indictment, by action, or not at all, for an act or neglect which is claimed to be in violation of law; as, for example, where a minister of religion or a justice of the peace refuses to perform a ceremony of marriage, after the lawful steps have been taken by the parties, and they have tendered him the legal fee. There have been two cases in England; which, however, do not much enlighten us. The statutes, 6 & 7 Will. 4, c. 85, and 7 Will. 4 & 1 Vict. c. 22, made various provisions relating to marriage, and employed language which at least implied that the clergyman was expected to marry parties when lawfully called upon to do so. For example, the first section of the former of these two acts provided, that "all the rules prescribed by the rubric concerning the solemnizing of marriages shall continue to be duly observed by every person in holy orders of the Church of England who shall solemnize any marriage in England;" but the implication was perhaps more strongly derivable from the entire language, considered as a whole. Thereupon, in one case, a clergyman was sued by the party for refusing to solemnize a particular marriage; but, after verdict against the defendant, the declaration was held to be bad. And the query was raised whether or not this sort of action, however well brought, is maintainable. Patteson, J., observed: "I confess there appears to me a great difference between such a question at com-

[1] Kent *v.* The State, 8 Blackf. 163. And see The State *v.* Cain, 6 Blackf. 422.
[2] The State *v.* Pool, 2 Ind. 227.

mon law and since the marriage act; because formerly the ceremony might have been performed anywhere, so that the duty could not well have been fixed upon any particular clergyman." [1] In a subsequent case, a clergyman of the Church of England having refused to celebrate a marriage, on the ground that one of the parties had not been confirmed, and did not desire to be, he was indicted; but, after conviction, the indictment and the evidence taken together were held to be inadequate, and the judges declined, though requested, to express an opinion on the main question. The facts were, that the parties merely called on the clergyman at his house, not at the chapel, at nine o'clock in the evening, and, showing him their certificate, requested him to appoint a time for their marriage; but he told them he would marry them when they had expressed a desire to be confirmed, and not till then. And this was held to be no proper tender of the parties for marriage, or a legal demand of marriage, and the clergyman was not liable to an indictment for his refusal at such time and place. Moreover, the indictment should have shown, as it did not, that the man and woman were parties who might lawfully intermarry.[2] One ground of the doubt in these cases was, whether the question was not for the ecclesiastical courts rather than the temporal, — a form of the question which would not arise in this country.[3] In Illinois a statute provides that a clerk who wrongfully issues a marriage license to a minor shall forfeit a penalty "to the use of the father;" and this, it is held, enables the father to sue for the penalty in his own name.[4]

[1] Davis *v.* Black, 1 Gale & D. 432, 440, 1 Q. B. 900.

[2] Reg. *v.* James, 2 Den. C. C. 1, Temp. & M. 300, 4 Cox C. C. 217, 3 Car. & K. 167, 14 Jur. 940, 19 Law J. N. S. M. C. 179, 1 Eng. L. & Eq. 552.

[3] See, as to the principles involved in this question, Bishop Stat. Crimes, § 137, 138, 144; 1 Bishop Crim. Law, 5th ed. 237, 238.

[4] Adams *v.* Cutright, 53 Ill. 361.

CHAPTER XXI.

CONFLICT OF MARRIAGE LAWS AS TO THE INCEPTION OF THE STATUS.

§ 348. **Difficulties of the Subject — How treated here.** — In the entire field of our jurisprudence there are no questions more embarrassing than those which pertain to what is termed the conflict of laws, or private international law, as respects marriage and divorce. The present chapter opens to us one branch of the subject, that as to marriage; the other, as to divorce, will come before us in the next volume. In the present chapter, we shall be obliged to proceed cautiously, and sometimes to repeat our steps, in order that no really important view of the subject shall escape our observation.

§ 349. **How the Chapter divided.** — What is here to be said will be divided as follows: I. The General Doctrine. Under this head we shall consider, in a general way, the various propositions relating to the subject; then proceed to a minuter examination of the leading specific propositions, II. That a Marriage good where celebrated is good everywhere; and, III. That a Marriage invalid where celebrated is everywhere invalid.

I. *The General Doctrine.*

§ 350. **Preliminary Propositions.** — There are a few propositions which it is important we should have present in our minds when proceeding with this discussion. They are, in their nature, axioms, or so near to being such that no authorities need be cited to them; though they are, in fact, not without their support in actual adjudication, as well as in legal reason: —

First. As matter pertaining to the internal government of

a country, it is competent for the legislative power of any country, unless restrained by some written constitution, and in this case it is competent for the power which makes the constitution, to command the domestic judicial tribunals to violate established principles of law, and even the law of nations.

Secondly. In the absence of words express and conclusive, and admitting of no other interpretation, no court will presume that the legislative power intended to do a thing of this sort; and, where there is a statute in general terms, if it may have a reasonable general application without being carried so far as this, the court will not carry it so far.

Thirdly. Every independent nation is supreme in power over its own territory; and it can bind all persons and things found therein, while they there remain, whether their occupancy is of a temporary or permanent nature.

Fourthly. Every government has a sort of power over its own subjects when abroad; but no right-minded government will attempt so to exercise this power as to interfere with the rights of other governments over all persons and things occupying, whether temporarily or permanently, any part of their territory.

Fifthly. Out of these propositions grows another, namely, that the statutes of a country and its common law will be holden, *primâ facie*, not to bind subjects who may be lawfully, though temporarily, within the dominions of other powers.

Sixthly. Right-minded governments will be friendly to one another, while at the same time each will consider that the keeping of its own interests is in its own hands. Consequently, if one government desires to control the action of its subjects while within the territorial limits of another government, it will not carry out its wish under any claim of right as against the latter; and the latter will grant the permission or not, according as it judges that the granting of it will be prejudicial or otherwise to its own interests.

Seventhly. Except in cases of embassadors, and the like, where a particular respect is shown to the person of a foreign sovereign or his deputy, no government will allow within its dominions the existence of any state of society foreign to the condition and order of things laid down for its own citizens.

§ 351. **Other Propositions.** — In considering how the foregoing propositions are to be applied in marriage and divorce law, we should take into the account two other propositions equally axiomatic: —

First. Marriage is a thing of right, recognized in all countries, in all ages, among all people, all religions, all philosophies. It is, therefore, in the highest sense, a matter pertaining to the law of nations, in distinction from the law of any particular state or country.

Secondly. Divorce is a thing approved of in some countries, in some ages, among some people, and by some classes of opinion; but disapproved of and disallowed in other countries and times, and by other persons and opinions. Therefore divorce is a local institution, a thing pertaining to the peculiar laws of some localities; but it is not of universal right or international law.

From these two propositions let us here draw a corollary; namely, —

The two things, marriage and divorce, must in some respects be governed by different rules.

§ 352. **Marriage and Divorce governed by Different Rules — Domicil the Rule as to Divorce.** — Taking up here the corollary just stated, let us observe, that, according to what the author deems to be the true doctrine in respect to divorce, — the doctrine generally received in the United States, though not perfectly recognized in England and in Scotland, — the courts of the actual domicil of a married party are properly competent to undo the matrimonial bond which binds such party, whether the other party is in the same jurisdiction or not, yet the courts of no other state or country are thus competent. If the parties are in different jurisdictions, and the court having authority in one of the jurisdictions releases a party from the *vinculum* of the marriage, the other party will indeed be released also; but the reason will be, not that the court had any control over him, or over his status as married or single, it will be because the law of his own domicil does not recognize a man as a husband who has no longer a wife.[1]

§ 353. **What the Rule as to Marriage — Place of Actual Celebra**

[1] Vol. II. § 137, 141, 142, and the chapter beginning at § 143.

tion. — But the corollary teaches us, that the rules as respects marriage are not all the same as those which concern divorce. Does the rule of the last section apply to marriage? To a certain extent it may; but it does not, it cannot in reason, apply in its full extent. In marriage — marriage is everywhere favored, divorce is not — the prevailing rule is, that, whenever there is such a transaction as the law of the place where it occurs pronounces to be a marriage, the parties to this transaction will be holden everywhere else, as well as there, to be husband and wife. And the corresponding rule is, that, if in any locality a man and woman enter into what in the locality, by its general law, is regarded as being a marriage, no inquiry will be instituted concerning whether they were domiciled there or not; but this marriage will there be held good if they are merely transient persons, equally as if they were citizens. Thus where, in Kentucky, a statute prohibited certain classes from intermarrying with one another, and two Kentuckians of the prohibited class crossed the line into Tennessee and there intermarried, there being no like provision in Tennessee, the Kentucky court, speaking of this Tennessee marriage, observed, by Marshall, C. J.: "As the prohibitory law of Kentucky would have had no force in Tennessee, the marriage in the latter State must there have created the lawful relation or status of marriage, by which the parties were in law and in fact lawful husband and lawful wife to each other in the State of Tennessee, so soon as the marriage was performed, and continued to be, so long as they remained, and would have been so if, at any time before an actual divorce, they had returned to that State. And so, if immediately after the marriage they had gone through the other States, and even to Europe, intending all the time to return to Kentucky, they would have been lawful husband and wife in every place, at least in every country where the common law prevails; because it is a part of that law that, being lawful husband and wife at the place of marriage, they continue to be so wherever they may be."[1]

§ 354. **Continued.** — The same view which this Kentucky opinion presents, as the one which would be taken of the matter in Tennessee and in other States and countries, passed

[1] Stevenson v. Gray, 17 B. Monr. 193.

shortly afterward in England — where, however, this Kentucky opinion was probably unknown — into actual judgment in respect to a marriage celebrated in England between French parties who had come into England to be married in evasion of the law of their domicil, which required them, whether married at home or abroad, to procure the consent of parents, and made the marriage void where the consent had not been given. When they had thus united themselves in marriage, in England, according to the forms of the English law, they returned to France; and there, by a French tribunal, this marriage was pronounced void. And since at the time of sentence pronounced, the parties were domiciled in France, the English court ought, had the American doctrine prevailed in England, to have held this sentence of nullity to be a conclusive dissolution of the marriage.[1] This point, however, was not taken in

[1] A correspondent kindly calls my attention to the fact that the American rule, as stated ante, § 352, relates in terms to decrees dissolving a marriage which was valid in its inception, while the French decree here spoken of was one pronouncing the marriage never to have been valid, and he asks whether there may not be a difference in principle between the two sorts of decree. The discussion of questions like this belongs to our second volume; but I will here observe, that, in the facts of most of the adjudged cases, the decree has been one dissolving a valid marriage; still I am not aware that any difference of principle between such a decree and a decree of nullity has ever been suggested, or that there is anything on which a distinction can be maintained in legal argument. The reason why, if the French decree had been one dissolving the marriage, it ought, on the American rule, to have been accepted as binding in England, is, that the parties were domiciled French subjects, and that by the law of nations it is competent for the courts of the domicil to determine the matrimonial status of the parties. If a man comes from another country here, we receive him as married or single according as he was the one or the other in the country, and by the laws of the country, from which he emigrated. And if, in such country, there has been a judicial decree fixing the status, we accept the decree as conclusive, and it would plainly seem to be immaterial whether it was in form a decree of nullity or of divorce. But it may be asked, why, if this is so, should not the English court have held the marriage to be null the instant after its celebration, on being judicially informed that it was null by the law of the domicil of the parties. The answer is, that the parties had not then returned to France, and that French authority had not yet acted on the subject. The cause was French, and the English courts could not sit to try such a cause, by French law, in contradiction to the law of England. But when afterward the French parties went home, and there the tribunal of the domicil sat upon the case and determined the question of their matrimonial status, this placed them and their status in a new relation before the English tribunal, when, at a still later period, a party agitated the question in England. Such, it is believed, is the doctrine derivable both from American authority and from the true legal reason of the case.

the case; and it does not seem to have occurred to any one. But the English court, being the full Court for the hearing of Divorce and Matrimonial Causes, treating the case as it would have done if there had been no sentence of nullity in France, and having jurisdiction by reason that the lady had become domiciled in England, and that this was a marriage celebrated in England (the latter being a fact deemed important there, but it would not be so in the United States), held the marriage to be, in England, valid. Said Cresswell, J.: "Every nation has a right [this is what France had done by her laws] to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and, if its subjects sustain hardships in consequence of those restrictions, their own nation only must bear the blame. But what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? . . . . The great importance of having some one certain rule applicable to all cases; the difficulty, not to say impossibility, of having any rule applicable to all cases, save that the law of the country where a marriage is solemnized shall in that country at least decide whether it is valid or invalid; the absence of any judicial decision or dictum, or of even any opposite opinion of any writer of authority on the law of nations, — have led us to the conclusion, that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects."[1] This case does not, indeed, cover all the ground, and decide what would have been the relation of the parties to each other, if, after being married in England, they had gone to Spain instead of returning to France; but no one can doubt, that, upon general principles of jurisprudence, they would have been held, in Spain, to be married persons.

§ 355. **If Valid where entered into, Valid everywhere.** — We have thus laid the foundation whereon is erected the general doctrine relating to this subject. Marriage — being thus an institution of international law, prevailing in all countries, constituting an essential element in all earthly society, recog-

[1] Simonin *v.* Mallac, 2 Swab. & T. 67, 83, 85.

nized alike by the law of nature and the municipal laws of every people — must be everywhere deemed to be constituted when it is constituted in any single locality. In other words, whenever the tribunals of any one country hold parties to be married, those of every other country must hold them to be married also. This doctrine is essential to the very existence of marriage, viewed as an institution of international law; because, if the tribunals in one jurisdiction should declare parties to be married, and those in another should declare them not to be married; if in one national domain persons should be deemed to be united in pairs in a certain way, and in another the pairs of the same persons should be differently made up; there would be an end of the harmony essential to the existence either of international marital law or of the comfort or safety of persons going from one country to another. The general principle has therefore been settled, that, in the absence of any local statute compelling the courts to violate a fundamental doctrine of private international law, a marriage valid by the law of the country in which it is celebrated, though the parties are but transient persons, though it would be invalid entered into under the same formalities in the place of their domicil, and even though contracted in express evasion of their own law, is good everywhere.[1]

§ 356. **Continued.** — This doctrine, in its broad extent, has indeed been questioned, not only by continental jurists,[2] but by very able English judges. Thus, Sir George Hay, in Harford *v.* Morris, considers that a mere transient residence in a country, by going there one morning and coming away the next, is

[1] Story Confl. Laws, § 79–81; Compton *v.* Bearcroft, Bul. N. P. 114, 2 Hag. Con. 430, 443, 4 Eng. Ec. 578, 585; Scrimshire *v.* Scrimshire, 2 Hag. Con. 395, 4 Eng. Ec. 562; Herbert *v.* Herbert, 2 Hag. Con. 271, 4 Eng. Ec. 534, 3 Phillim. 58, 1 Eng. Ec. 363; Sutton *v.* Warren, 10 Met. 451; Commonwealth *v.* Hunt, 4 Cush. 49; Swift *v.* Kelly, 3 Knapp, 257; Lacon *v.* Higgins, 3 Stark. 178; Morgan *v.* McGhee, 5 Humph. 13, and Wall *v.* Williamson, 8 Ala. 48, where the rule was held to apply to marriages contracted in an Indian nation; Patterson *v.* Gaines, 6 How. U. S. 550; Phillips *v.* Gregg, 10 Watts, 158; Fornshill *v.* Murray, 1 Bland, 479; Dumaresly *v.* Fishly, 3 A. K. Mar. 368; Ferg. Consist. Law, 20, 28, 29; 1 Burge Col. & For. Laws, 184, 187; 2 Roper Hus. & Wife, by Jacob, 496; Lord Brougham, in Warrender *v.* Warrender, 9 Bligh, 89, 111; Munro *v.* Saunders, 6 Bligh, 468, 473, 474; The State *v.* Patterson, 2 Ire. 346; Kynnaird *v.* Leslie, Law Rep. 1 C. P. 389.

[2] 2 Kent Com. 91.

not sufficient to give the local law cognizance of the marriage; but that there must be a domicil, and that under some circumstances even a domicil is not sufficient.[1] And it has been further attempted to weaken the force of the general proposition, as sustained in the earlier English authorities, by the suggestion, that Scotland and places beyond the seas are excepted from Lord Hardwicke's English marriage act;[2] and, therefore, that marriages in Scotland and beyond the seas, good by the local law, were, while this act was in operation, good by force of the exceptive clause in it.[3] Still, whatever doubts may have arisen on the subject, the doctrine in its broad terms, as laid down in the last section, is established in the United States; and, until recently, it was deemed by most persons to have been so also in England.[4] It covers both the forms by which the marriage is contracted, and, subject to an exception or two to be mentioned by and by, the personal capacity of the parties to enter into marriage.[5]

§ 357. *Expansion of the Foregoing Views, in the Light chiefly of Juridical Reason:* —

As though all Nations under one Government. — If this question were not of the very highest importance in the law, we might here conclude our present sub-title and proceed to a consideration of the minor distinctions which the courts have drawn. As it is, we must take a still wider survey of the general doctrine. There cannot be a doubt, that, if all the world were under one government, the doctrine must be — certainly ought to be — in all its particulars and circumstances, without any exception or qualification, what in general terms it has thus been stated as being. To hold, on that supposition, a

[1] Harford *v.* Morris, 2 Hag. Con. 423, 4 Eng. Ec. 575. See also the remarks of Lord Mansfield in Robinson *v.* Bland, 2 Bur. 1077, 1079.

[2] 26 Geo. 2, c. 33. This statute, after making certain regulations concerning marriage, the non-compliance with most of which regulations renders it void, adds, in § 18, "That nothing in this act contained shall extend to that part of Great Britain called Scotland, . . . nor to any marriages solemnized beyond the seas." The present English marriage act differs from this in the respect now under consideration. See Brook *v.* Brook, 3 Smale & G. 481; s. c. on appeal, 9 H. L. Cas. 193.

[3] Harford *v.* Morris, supra; 1 Burge Col. & For. Laws, 192.

[4] See the cases cited in the note to the last §, and particularly Compton *v.* Bearcroft; Story Confl. Laws, § 123 *a*.

[5] 1 Burge Col. & For. Laws, 188, 199.

marriage to be good in some localities and ill in others, would be to degrade the institution from its high place as a thing of universal and equal regard, into a mere local robber of rights upon the great highway of life. And since, though there are many governments, marriage is an institution common to all, pertaining to the one law which pervades all nations, the result ought to be the same as though there were but one nation, all people being governed by one power. If in any instance there is found to be a departure from this condition of things, it is through the fault of one or the other of the two powers between whose laws the conflict exists. And though the courts of both nations may be bound by statutes which leave them no election, the legislative body, if there is a conflict, did wrong in so binding the courts; but, where the statutes will admit of interpretation, the tribunals of the two nations ought so to construe them as to prevent the conflict.

§ 358. **Adjudications in each Country should be such as, if adopted by all, would prevent Conflict.** — Out of the doctrine laid down in the last section we draw the following results, — that the law of no country should be such, as, adopted in all other countries, would leave any conflicts between the different systems of law pervading the different countries. But, upon a principle which was noticed in an earlier section of this chapter,[1] — namely, that it is for each government to control all persons and things within its territorial limits, — no government can demand of any other that it pursue the internal policy of the former, when regulating the institution of marriage as a domestic interest within its own territory. Therefore, as the circumstances of nations differ, and as the opinions of people differ, the laws of marriage, as respects what is domestic in this institution of international law, will, in different countries, diverge more or less from one another; consequently, assuming such divergence to exist, no country should so frame its laws, and no court should so construe them, unless absolute necessity compels, as, if all other nations should do the same, would leave any conflicts upon this question of marriage. For example, if England holds, that, when two transient French people are married in England, according to a

[1] Ante, § 350.

form which would be valid were the marriage celebrated between two English residents, the marriage should be ever afterward esteemed good in England, though it was null by the French law, — as we have seen she does,[1] — then should England hold also, as she was till recently supposed to, that when, in like manner, two transient English people are in France married in a way to make them, on the like rule, indissoluble husband and wife in France, they are likewise to be ever afterward esteemed indissoluble husband and wife in England; though the marriage, celebrated in France, was one which the general English law would not allow.

§ 359. **Why Lex Loci Contractus should govern.** — But is it correct in legal doctrine, that, when parties are travelling in a country, not permanently domiciled there, they should be permitted to marry in a way contrary to the provisions of the law of their domicil? In other words, must every government, before allowing a marriage to take place within its territorial limits, cause inquiry to be made whether the parties are *bona fide* domiciled citizens, and, if in a particular instance they are found not to be, forbid the banns, or postpone them till a commission has been sent abroad to take testimony, and it is thereby ascertained that the law of their domicil permits them to marry, and to marry in the particular way proposed? And if, in any instance, the government finds it has been deceived, and the two married persons did, in fact, at the time of the marriage entertain a secret purpose to return to their former residence, thereby proving that they were not domiciled where they were married, must then the government hold the marriage void, and proceed against them criminally for fornication? It is not necessary that these questions be pressed upon the understanding of any intelligent reader. We all know, that no government does institute such inquiries before permitting a marriage, or proceed in any of the other ways thus pointed out; and we know that there is not any government so debased as to suffer itself to be compelled into pursuing such a course, at the demand of any other government.

§ 360. **Continued.** — We have thus, by another process of reasoning than the one first instituted in this chapter, con-

[1] Ante, § 354.

ducted the argument to the conclusion first drawn, namely, that every government ought to accept of all marriages celebrated within the territorial limits of other governments, whether they are such marriages as itself approves or not, and whether between its own citizens there transiently going, or between other persons, as good and lawful. There is no other ground upon which conflicts can be avoided. Unless this doctrine does prevail, we have the unseemly spectacle of the same persons being held to be differently mated in marriage in different countries, — a spectacle abhorrent to the natural feelings of pure minds, and corrupting to all minds susceptible of being debased.

§ 361. **Continued — Further Reasons.** — Various other grounds have been assigned, why a marriage good by the law of the place of its solemnization is good everywhere; unless, indeed, these other grounds may be deemed to be the same in other forms of words as the foregoing. Let us consider them a little, or, at least, multiply words a little further upon this subject. Sometimes the doctrine has been referred to the general one, that the validity of a contract is to be determined by the law of the locality in which it is made.[1] "Some writers," observes Dr. Radcliff, "say that the rule rests in the *comity* of nations; but Lord Brougham[2] says, it may be laid down with more appearance of truth that it is *ex debito justitiæ*, the parties agreeing to have the contract formed, and its validity determined, according to that law.[3] And that this is the true principle, I must refer to the cases cited,[4] and principally to Scrimshire *v.*

[1] Ferg. Consist. Law, 28, 29; Poynter Mar. & Div. 278.

[2] In Warrender *v.* Warrender, 2 Cl. & F. 488, 529, 530. In a Scotch case, Mr. Commissary Ross observed, of the rule that the *lex loci contractus* governs in respect to the validity of contracts: "This is merely a proceeding in execution of the will of the parties, and not the least a recognition of the authority of the foreign law." Ferg. 360, 3 Eng. Ec. 480.

[3] The argument of Lord Brougham, referred to by Dr. Radcliff, seems to be, that the essence of marriage is consent, and that there is a marriage whenever there is a consent, the peculiar forms enjoined by law being only modes of evidencing this consent; but that the consent is evidenced when expressed in the forms recognized by the law of the place where the parties may be, at the moment when it is mutually given. And see post, § 366.

[4] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 4 Eng. Ec. 485; Ruding *v.* Smith, 2 Hag. Con. 371, 4 Eng. Ec. 551; Middleton *v.* Janverin, 2 Hag. Con. 437, 4 Eng. Ec. 582; Harford *v.* Morris, 2 Hag. Con. 423; 4 Eng. Ec. 575; Scrimshire *v.* Scrimshire, 2 Hag. Con. 395, 4 Eng. Ec. 562.

Scrimshire, and Sir Edward Simpson's luminous judgment in that case, and to Ilderton *v.* Ilderton,[1] and to Huberus. That rule is eminently calculated to prevent uncertainty and confusion, and is generally established among the Christian nations of Europe, in order to avoid the ill consequences that would ensue if countries did not observe the laws of each other in questions of marriage." [2]

§ 362. **Continued — Comity.** — In some Massachusetts cases, Parker, C. J., remarked, that comity would not be offended by declaring null a contract entered into in violation of the laws of the State in which the parties live,[3] and that so the principle applied to marriage is not necessarily applicable to contracts of a different nature, — usurious, gaming, or others, — made unlawful by statutes, or by the common law. Comity does not oblige the government of any country to protect its subjects in evading its laws by incurring abroad obligations which they could not enter into at home. But the rule, he considered, rests, both in England and in this country, on the extreme danger of vacating a marriage valid where it is solemnized; thus bastardizing innocent children, and committing an outrage on the public morals.[4]

§ 363. **Continued — Rule Universal — Reason.** — Returning now to the propositions already mentioned, that marriage cannot be a thing of cognizance by the international law, and that the relation as one of municipal law will be immeasurably burdensome to persons who have occasion to travel or remove from one State or country into another, unless a common rule is established, of universal recognition in all countries, whereby the courts shall determine when persons are married and when they are not, — we are to inquire once more, what, in reason, must be this universal rule? And the answer which reason gives, is the following: since marriage is a thing of natural right, — since it is an institution everywhere to be protected

[1] Ilderton *v.* Ilderton, 2 H. Bl. 145.

[2] Steele *v.* Braddell, Milward, 1, 20.

[3] It has been with great weight of reasoning denied, that comity is the true principle on which generally a contract, made in one country, is enforced in another according to the laws of the former; although the doctrine is usually expressed in this way. Lord Brougham in Warrender *v.* Warrender, 2 Cl. & F. 488, 9 Bligh, 89; Story Confl. Laws, § 226 *c*, note.

[4] Putnam *v.* Putnam, 8 Pick. 433; Medway *v.* Needham, 16 Mass. 157. See also 2 Kent Com. 92; Poynter Mar. & Div. 287; Story Confl. Laws, § 124.

and cherished, — since, when once it is anywhere recognized as existing between two persons, it ought to be everywhere else recognized, — if, in any circumstances, there has happened in any country that in consequence of which the tribunals of the country will hold persons, therein being, to be married, the tribunals of every other country should hold them to be married also. And though the persons should be found to be only transiently in the country wherein the marriage takes place, this rule should apply to them equally as though they were domiciled there; because the necessity of uniformity of decision exists as well in the one instance as in the other, and because we shall gain no useful end by requiring proof of domicil whenever a marriage is to be proved.

§ 364. **Continued — Evasion of one's own Laws.** — And concerning what is called a going away by parties from the place of their domicil to contract a marriage in fraud of their own laws, the true answer to what is said on this point is the following: The legislation of a country can make what regulations it pleases, to govern the courts of the country. If it pleases, it can require the courts to recognize as valid no foreign marriage whatever; but this fact does not absolve them from the duty to follow sound principles of jurisprudence in the absence of express legislative direction. And when a statute directs how marriages shall be solemnized, and between what persons, if it is general in its terms, the courts, in the absence of some express circumstance, should construe it as applying only to marriages within the territorial limits of the country or State over which the legislature has control. This is a sound principle of statutory interpretation; it governs also other statutes than matrimonial.[1] It is, in the next place, competent for persons to choose how, where, and when they will be married. If individuals, desiring to be married, find the laws of the country in which they are, forbidding the union within the territorial limits of the country, — find the statute law prescribing certain forms which they choose not to follow, or defining who may enter into the relation, and they are not within the definition, — yet find a law, not of statutory regu-

[1] 1 Bishop Crim. Law, 5th ed. § 115, note, par. 9, and the places there referred to.

lation, but equally a law of their own country, under which they are able to superinduce the status upon themselves in some other way, by going into another State or country, they simply follow a proper impulse of nature and a rule of the highest reason, while also they follow the law of their own country, in availing themselves of their privilege of marrying abroad. They do not, in any just sense of the expression, commit a fraud upon their own laws.

§ 365. **Continued — Law of Nature — Local Rule.** — There is another aspect of this question worthy to be considered. By the law of nature all persons of the needful physical and mental ability may intermarry, by mere words of present consent; and this law of nature is taken cognizance of by all judicial tribunals the world over, with this qualification, that, where there is in a particular place a local rule contrary to the law of nature, the local rule supersedes natural law in the particular locality. But no local rule of any country extends beyond the limits of the country; therefore, as a lesser proposition contained in the greater, the local law of marriage of a particular country does not extend beyond the territorial line. The consequence is, that the courts of each country would hold all marriages though by mere mutual consent, solemnized in other countries, to be good, were it not for the operation of another principle now to be stated. It is, that, when an agreement between persons is entered into, not on the high seas, not on unoccupied land, but within the dominions of a foreign power, no evidence will be admitted by our tribunals of the agreement, if it would not be recognized as binding in the place in which it is made.

§ 366. **Continued.** — In the words of Lord Brougham, as employed in the case referred to by Dr. Radcliff,[1] the question under such circumstances is, "Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the

[1] Ante, § 361.

contract. If those laws annex certain disqualifications to parties circumstanced in a particular way, or if they impose certain conditions precedent on certain parties, this falls exactly within the same rule ; for the presumption of law is in the one case, that the parties are absolutely incapable of the consent required to make the contract, and in the other case, that they are incapable until they have complied with the conditions imposed." [1]

§ 367. **Continued — In what Sense the Foreign Law in Force here.** — Therefore the ground on which the validity of a foreign marriage is held to be triable by the foreign law, is not that such law has, *proprio vigore*, any force in the domestic forum. All marriages are really to be judged of by the law of the country in whose tribunals they are drawn in question. This principle is universal, applying even to marriages celebrated in foreign countries between domiciled citizens of those countries, as well as to marriages between citizens of our own country transiently abroad ; because every court must decide all questions before it according to its own law. And in the Dalrymple case Lord Stowell well observed, that the question of the parties' marriage, "being entertained in an English court, must be adjudicated according to the principles of *English* law applicable to such a case. But the only principle applicable to such a case, by the law of England, is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." [2]

§ 368. **Continued — Laws extended over Subjects abroad.** — But we have already seen,[3] that a doctrine of international law allows every government to regulate, as it chooses, the con-

[1] Warrender *v.* Warrender, 2 Cl. & F. 488, 530, 531.

[2] Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 58, 4 Eng. Ec. 485, 487, Holroyd, J. in Doe *v.* Vardill, 5 B. & C. 438, 454. And see the observations of Sir Herbert Jenner Fust in Connelly *v.* Connelly, 2 Robertson, 201, 248, et seq., 2 Eng. L. & Eq. 570, 574 ; and of Sir E. Simpson, in Scrimshire *v.* Scrimshire, 2 Hag. Con. 395, 4 Eng. Ec. 562.

[3] Ante, § 350.

duct of its subjects abroad,[1] except that it cannot go to the extent therein of interfering with the rights of the people of other countries. Therefore the matrimonial regulations of any country may, by their express terms, be made to control the citizens of the country wherever they are. "Every State," says Mr. Burge, "retains the power of making a law requiring its own subjects to conform to it, in whatever country they may reside. It may, therefore, by its marriage law, expressly enjoin that the marriage of its subjects shall be preceded or accompanied by certain ceremonies, which are capable of being performed in whatever country the marriage is celebrated; and it may declare that, unless those ceremonies are performed, the marriage shall be void." And he mentions Holland and France, whose respective governments have established rules concerning the marriages of their subjects abroad.[2]

§ 369. **The Doctrine subject to Legislative Control.** —While, therefore, the common law makes the foreign law its own, when deciding on the validity of a marriage celebrated in the foreign country, this rule, like other common-law rules, is subject to the legislative control. We shall even see, by and by, that it has its common-law exceptions: it may have also its statutory exceptions; as in Holland and France, to which reference has just been made. And there are statutory exceptions in some of the United States; as, in Massachusetts, where its Revised Statutes, enacted since the contrary point was decided by its courts,[3] followed by the General Statutes, have directed that, "when any persons resident in this State, shall undertake to contract a marriage contrary to the [provisions of the statute], and shall, in order to evade those provisions, and with an intention of returning to reside in this State, go into another State or country, and there have their marriage solemnized, and shall afterwards return and reside here, such marriage shall be deemed void in this State."[4]

[1] 1 Bishop Crim. Law, 5th ed. § 109–123.

[2] 1 Burge Col. & For. Laws, 196. And see, as to France, Simonin *v.* Mallac, 2 Swab. & T. 67; Scrimshire *v.* Scrimshire, 2 Hag. Con. 395, 4 Eng. Ec. 562.

[3] Post, § 371.

[4] R. S. c. 75, § 6, re-enacted Gen. Stats. c. 106, § 6. For suggestions as

§ 370. **General Summary.** — Perhaps, in the foregoing statement of reasons, there is too near an approach to repetition, and less condensation than there would be but for the desire of the writer not to disturb too much the former arrangement of his matter, while still, in the enlarged editions, he enlarged the discussion on this most vital topic. The result to which we come is, that, for the peace of the world, for the prosperity of its respective communities, for the well-being of families, for virtue in social life, for good morals, for religion, for every thing which the race of man hold in common, and in common hold dear, it is necessary there should be one universal rule whereby to determine whether parties are to be deemed married or not; and that the only rule which can be adopted is, to refer this question to the law of the country in which they are when they enter into a mutual consent to be husband and wife, which by the law of nature is a perfect marriage. If, in such country, they are deemed to be married, the tribunals of every other country must deem them to be so likewise, or no end can be predicted to the confusion which will ensue. And as a general proposition, "all nations have," in the language of Sir Edward Simpson, "consented, or must be presumed to consent, for the common benefit and advantage, that marriages should be good or not, according to the laws of the country where they are made. By observing this law, no inconvenience can arise." [1] As a general doctrine, this proposition is received as true both in England and in the United States. But there are everywhere acknowledged to be limits to the doctrine; what those limits are, and how the general doctrine is applied, we shall see under our next sub-title.

II. *That Marriage good where celebrated is good everywhere.*

§ 371. **General Doctrine — Illustrations.** — The general doctrine embraced in the heading to this sub-title, with its reasons, and the authorities on which it is based, was discussed in the last sub-title. It remains for us, in the present sub-title, to give the doctrine more definite form, to draw more exactly its

to the construction of this statute, see Commonwealth *v.* Hunt, 4 Cush. 49.

[1] Scrimshire *v.* Scrimshire, 2 Hag. Con. 395, 417, 4 Eng. Ec. 562, 572; and see the entire opinion of this able judge.

limits, and to see what exceptions to it the law has made. The Massachusetts court held, prior to the enactment of a statute changing the common-law rule,[1] that, where parties who by a statute of the State were incapable of contracting matrimony with each other, because of one of them being a white person and the other a negro, went, for the purpose of evading the statute, into Rhode Island, where such connections were allowed, and were there married and immediately returned, — the marriage, being good in Rhode Island, was good in Massachusetts.[2] So, where a man and woman residing in Massachusetts, the laws of which State prohibited the guilty party after a divorce from entering into another matrimonial connection, went, in order to evade this provision, into Connecticut, after the man had been divorced in Massachusetts from his wife for his adultery, and were married there and immediately returned to Massachusetts, the marriage was held in the latter State to be good.[3] And the like was held in Kentucky, the law of which State prohibited a man from marrying the widow of his deceased uncle: such parties, while domiciled in Kentucky, went into Tennessee and there had their marriage solemnized, no corresponding provision existing in the Tennessee law, then returned to Kentucky, and the tribunal of this State pronounced the marriage good in Kentucky.[4]

§ 372. **Conway *v.* Beazley — Polygamous Marriages.** — The judgment of Dr. Lushington in Conway *v.* Beazley is not opposed to these decisions, though the reporter's note of the case seems to represent it so. According to the note, "the *lex loci contractus*, as to marriage, will not prevail where either of the parties is under a legal incapacity by the law of the domicil." But the case itself merely decides the very plain point of law, that a Scotch divorce of English parties, married in England and likewise domiciled there at the time of the divorce, is void; and that, as a necessary consequence, a second marriage of one of them is void; though celebrated in

[1] Ante, § 369.

[2] Medway *v.* Needham, 16 Mass. 157. See on this point as to Louisiana law, post, § 375.

[3] Putnam *v.* Putnam, 8 Pick. 433; Cambridge *v.* Lexington, 1 Pick. 506. This rule has been since modified in Massachusetts by statute. Ante, § 369.

[4] Stevenson *v.* Gray, 17 B. Monr. 193.

Scotland, and though probably the Scotch courts would hold the divorce valid, and the marriage therefore good.[1] The courts of no country in which polygamy is not tolerated can allow a man to have two wives at the same time; and, if a tribunal is compelled, by the principles of jurisprudence governing it, to pronounce a particular divorce void, it must declare a second marriage of either of the parties to be void also, whether such second marriage were celebrated at home or abroad.[2]

§ 373. **Continued — Evasion of Law of Domicil.** — Mr. Burge, in his Commentaries on Colonial and Foreign Laws, appears to regard the adjudication in Conway *v.* Beazley as being in conflict with the Massachusetts cases; and he deems it "the more sound decision." He maintains, that the doctrine of the *lex loci* ought not to be extended to make valid the marriage, where the party retains his domicil in the country in which the prohibitory law prevails, and merely resorts to another country for the single purpose of evading the law of his own. In this view he is sustained by Huber, perhaps also by some other continental jurists, and countenanced by the case of Harford *v.* Morris;[3] but, the case of Conway *v.* Beazley failing him, he, as the authorities stood when the earlier editions of this book were published, is substantially without support in any English adjudication, and entirely so in any American one. Indeed, on the point of common-law authority, he merely contends that the English cases may be explained away by the view, before alluded to,[4] of the marriage act.[5] Mr. Justice Story considers, that, whether the argument drawn from the English marriage act is tenable or not, the opposite doctrine

[1] Conway *v.* Beazley, 3 Hag. Ec. 639, 5 Eng. Ec. 242.

[2] Story Confl. Laws, § 114; Burge Col. & For. Laws, 188; Lord Brougham, in Warrender *v.* Warrender, 9 Bligh, 89, 112, 2 Cl. & F. 488, 532. In an Alabama case it was intimated, that perhaps polygamous marriages contracted in a country where polygamy is allowed by law would, in a Christian country, be deemed good on collateral proceedings. "A parallel case," add the court, "to a Turkish or other marriage in an infidel country, will probably be found among all our savage tribes; but can it be possible that the children must be illegitimate, if born of the second or other succeeding wife?" Wall *v.* Williamson, 8 Ala. 48, 51. See ante, § 221–226.

[3] Harford *v.* Morris, 2 Hag. Con. 423, 4 Eng. Ec. 575; ante, § 356.

[4] Ante, § 356.

[5] 1 Burge Col. & For. Laws, 190, 192, 194, 200.

to what is maintained by Mr. Burge clearly governed the adjudication in Compton *v.* Bearcroft; and that the question is settled, in the way indicated, both in England and America.[1] Of the same opinion is Chancellor Kent.[2]

§ 374. **Evasion of Law of Domicil, continued.** — A North Carolina decision, however, deserves mention. There the Supreme Court, overruling the superior and confirming the county court, held, that where parties, one of whom having been divorced for his own fault in North Carolina was therefore prohibited there by law from marrying again, went into the adjoining State of South Carolina, and intermarried and returned, in fraud, as it was called, of the law of their domicil, the marriage was null. But the marriage did not affirmatively appear, as a fact in the case, to be good in South Carolina; and the judge who pronounced the opinion supposed it was not good there. The statute of North Carolina had declared, that the defendant, or party offending, divorced from the bond of matrimony, should never marry again; and that, in the event of his marriage, he should be subject to the pains and penalties provided for persons guilty of bigamy. And the court considered the effect of this statute to be, to leave the guilty party in the same position as if there had been no divorce; therefore, said the judge, "*pro hac vice*, the first marriage is still subsisting."[3] In this view, the case goes no further, at the utmost, than the one before mentioned of Conway *v.* Beazley.[4] Neither the Tennessee decision in Dickson *v.* Dickson,[5] nor other like adjudications, wherein all such provisions of law are shown to be mere penal prohibitions, leaving the party whenever he passes beyond the jurisdiction imposing them, while in the nature of things the divorce of the husband is the divorce also of the wife, whatever be the language of the statute on the subject, since no more can the relation of wife exist without a husband than a valley can exist without a hill, — were before the North Carolina court; nor yet was any reference made to the before-mentioned Massachusetts cases.[6] What the

[1] 2 Story Confl. Laws, 3d ed. § 123 *a*, note. See Wadd. Dig. 236, note.

[2] 2 Kent Com. 92.

[3] Williams *v.* Oates, 5 Ire. 535. Compare this with ante, § 287 *a*.

[4] Ante, § 372.

[5] Dickson *v.* Dickson, 1 Yerg. 110.

[6] Ante, § 371.

result would have been if the attention of the court had been directed to these other cases and principles, we cannot know; yet passages in the report seem to indicate the opinion of the judges, that marriages should be held void whenever contracted in fraud of the law of the domicil. In one of the circuit courts of the United States, upon a like state of facts with those appearing in this North Carolina case, the divorce and prohibitory law having been in New York and the marriage in New Jersey, a decision has been made, fully in accord with these suggestions; the marriage being held to be good in New York.[1]

§ 375. **Exceptions to the General Doctrine.** — The foregoing cases assume as a fact, that the parties were not domiciled in the country where the marriage was celebrated, having resorted to it merely for the purpose of evading the law of their domicil. There are other cases in which, as already mentioned,[2] marriages of persons in foreign countries, whether domiciled in those countries or not, will not be recognized as good by the courts of other countries. These cases depend on the necessity which requires every tribunal to pay some decent regard to the law of nature, and the inherent fitness of things, as well as to the law of nations. On this principle, the court of Louisiana has refused to uphold a marriage, entered into in France, between a free white person and a person of color. Perhaps the judge who pronounced the opinion deemed the case to present the element also of the importance of enforcing the statutory policy of his own State; for he said: "Whatever validity might be attached in France to the singular marriage contract, and subsequent unnatural alliance, there celebrated between the plaintiff and the deceased testatrix, it is plain, that, under the facts in evidence, the courts of Louisiana cannot give effect to these acts, without sanctioning an invasion of the laws, and setting at naught the deliberate policy of the State."[3] But, on broader grounds, in a slaveholding community, as Louisiana then was, or any other community in which the amalgamation of the black and white races by lawful mar-

[1] Ponsford *v.* Johnson, 2 Blatch. 51.
[2] Ante, § 117, 356, 372.
[3] Dupre *v.* Boulard, 10 La. An. 411, opinion by Spofford, J.

riage is looked upon as a violation of a first law of nature, alliances of this kind may be deemed too offensive to receive the sanction of the tribunals. Especially also, where, according to a prevailing practice, it may be deemed to be a point of public policy to whiten out the black race by amalgamations without marriages, nothing could be so offensive or impolitic as to permit a white man to confine himself to one black woman, and so restrict the sphere of his operations by matrimonial bars. And these observations point to the true reason of the distinction between the decision now contemplated and the Massachusetts one before stated.[1]

§ 376. **Continued — Law of Nature — Incest — Polygamy — Insanity.** — And the general doctrine is, that, where the foreign marriage is forbidden not only by the law of the domicil but by the law of nature also, as where, for example, it is incestuous by natural law, it is treated as void both in the courts of the domicil of the parties, and in those of all other countries.[2] Incest and polygamy furnish the principal exceptions yet developed in the progress of jurisprudence, to the proposition that a marriage good where it is celebrated is good everywhere.[3] It has also been intimated, and is no doubt true, that, if in the foreign country a matrimonial connection between persons destitute of mental capacity to enter into it should be deemed valid, it would not be so regarded at home.[4] An incestuous marriage, within the meaning of the exception, is generally stated to be, not every marriage forbidden on account of consanguinity or affinity by the legislative enactments of the country in which its validity is drawn in question; for a State may prohibit, from motives of policy or from religious considerations, matrimonial connections between persons related in blood or affinity, not incestuous by natural law; "but, by the law of nature," says Chancellor Kent, "I understand those fit and just rules of conduct, which the Creator has prescribed to man as a dependent and social being; and which are to be ascertained from the deductions of right reason, though they may

[1] Ante, § 371.

[2] Greenwood *v.* Curtis, 6 Mass. 358, 379; Sneed *v.* Ewing, 5 J. J. Mar. 460, 489; Sutton *v.* Warren, 10 Met. 451.

[3] Story Confl. Laws, § 113 *a*; ante, § 117, 372.

[4] True *v.* Ranney, 1 Fost. N. H. 52.

be more precisely known and more explicitly declared by Divine Revelation."[1]

§ 377. **Incestuous Marriages, continued.** — Still, the question is an embarrassing one, what are the marriages prohibited as incestuous by the law of nature. It is universally agreed, that the prohibition includes all marriages between persons in the lineal ascending and descending degrees of blood relationship, and between brothers and sisters in the collateral line, whether of the whole or the half blood.[2] Yet whatever scruples may be entertained in regard to connections in the collateral line of consanguinity, between relatives further removed than brother and sister, the better opinion does not hold them incestuous by natural law.[3] Hence, as we had occasion to see in a previous chapter,[4] where in England a man married his mother's sister, while such marriages were there merely voidable, not void; and the parties removed to Massachusetts, where they are absolutely void by statute; the marriage was held in Massachusetts, on a collateral proceeding, to be good; that is, it was held to be, at least, no more than voidable, the same as in England, where it was celebrated. At the same time, the parties would have been subject, in England, to be pursued criminally (as well as civilly) in the spiritual court, and by its sentence punished for the cohabitation as being *incestuous;*[5] but, in declaring it so, the spiritual court would have followed the law of England as its rule of decision, not the law of nature. The statute 32 Hen. 8, c. 38, had provided, that all persons might marry, who, while being "without the Levitical degrees," were "not prohibited by God's law;"[6] yet no one would look to those degrees, more than to the Mosaic direction concerning the eating of flesh, as establishing a law of nature. Lord Brougham, however, speaking of a marriage between an uncle and his niece, has observed: "I strongly incline to think that our courts would refuse to sanction, and would avoid by sen-

[1] Wightman *v.* Wightman, 4 Johns. Ch. 343.

[2] Story Confl. Laws, § 114; 2 Kent Com. 83; 1 Burge Col. & For. Laws, 188. And see Butler *v.* Gastrill, Gilb. Ch. 156; Harrison *v.* Burwell, Vaugh. 206, 226.

[3] Sutton *v.* Warren, 10 Met. 451; Wightman *v.* Wightman, 4 Johns. Ch. 343; Stevenson *v.* Gray, 17 B. Monr. 193.

[4] Ante, § 117; Sutton *v.* Warren, supra.

[5] Burgess *v.* Burgess, 1 Hag. Con. 384, 393.

[6] Ante, § 108.

tence, a marriage between those relatives contracted in the Peninsula, under dispensation; although, beyond all doubt, such a marriage would there be valid by the *lex loci contractus*, and incapable of being set aside by any proceeding in that country."[1] Whatever weight is to be given to this mere dictum of an eminent judge, the reader cannot fail to have perceived, that he only speaks of avoiding the marriage by sentence, not intimating its invalidity without sentence, — a point which did not arise, and was not discussed, in the Massachusetts case. Therefore the Massachusetts decision is not in conflict even with this dictum.

§ 378. **Marriage with Deceased Wife's Sister — Brook *v.* Brook.** — Since the foregoing discussions were originally written, and published in the earlier editions of this work, a case has in England passed to judgment, affecting, if it is adhered to, a considerable alteration in the law as previously expounded; and, for this reason, and because the adjudications of the English tribunals are, in general, received with great and well merited respect in this country, it is necessary to give the case a somewhat careful examination. A man domiciled in England married abroad a sister of his deceased wife, the marriage being good in the country where celebrated; but it was held by Vice-Chancellor Sir John Stuart, assisted by Mr. Justice Cresswell, afterward judge ordinary of the Divorce Court, that, under the English law as it stood at the time of the marriage and the decision, the marriage could not be recognized as valid in England. That the reader may see the point presented, we may mention once more the statute of Hen. VIII.[2] which made lawful all marriages not prohibited by "God's law;" and repeat also, that, according to the construction of this statute given by the courts, the marriage of a man with the sister of his deceased wife is prohibited by "God's law," as being incestuous.[3] Such a marriage, however, was voidable only, not void, until Stat. 5 & 6 Will. 4, c. 54 (A. D. 1835), provided, "§ 2. That all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall

[1] Warrender *v.* Warrender, 9 Bligh, 89, 112; s. c. 2 Cl. & F. 488, 531.

[2] Ante, § 108, 376.

[3] Ante, § 316.

be absolutely null and void, to all intents and purposes whatsoever." Another (the 3d) section of the same statute directed, "that nothing in this act shall be construed to extend to that part of the United Kingdom called Scotland;" but the marriage in question was celebrated out of the British dominions. A view of the law, therefore, which might have prevailed with the judges, was, that the absolute nullity mentioned in the statute of Will. IV. was intended by the legislature to attach as a disqualification to the person, and so operated at the place of the celebration, though beyond the dominion of the English local law. And while observations in the report lead us to this view, other observations occur also, creating the doubt, whether these two judges would not go much further. On principle, plainly the statute cited should not have influenced the decision; because no statute of this kind is properly to have extraterritorial force, unless by its express words. The royal marriage act,[1] binding a single family of particular persons, is not in reason parallel with the one under consideration.[2]

§ 379. **Continued.** — The foregoing observations were made upon the case as it stood in the decision of it thus mentioned. Afterward the case was taken to the House of Lords, and there the conclusion arrived at by the judges above named was affirmed.[3] It is of considerable importance to the people of this country that the doctrine of this case should not be followed by our tribunals. For as each State of our sisterhood decides for herself, what law shall regulate the capacity of parties to intermarry within her borders, and as marriages are being constantly celebrated without much regard to State lines, if, whenever it appears that a marriage which State A would not approve was celebrated in State B, while the parties were domiciled in State A, the marriage is to be held null in A and binding in B, there is no knowing what arrests and trials for criminal cohabitations, of parties passing from State to State in our great country composed of many States, or what shiftings of bedding partners, will delight the eyes of strumpets

[1] Post, § 388.

[2] Brook *v.* Brook, 3 Smale & G. 481, decided by the Vice-Chancellor, April 17, 1858.

[3] Brook *v.* Brook, 9 H. L. Cas. 193.

and of rakes. As already observed, therefore, the case should be carefully and accurately considered by us.

§ 380. **Continued.** — Possibly we may understand this case as depending on the construction of some peculiar English statutes, rather than upon principles of general jurisprudence; if so, it does not much concern us. There are, in the opinions, some expressions used, from which this view may perhaps be derived. Yet if we look into the case independently of these expressions, we shall be persuaded, rather, that their lordships came to the conclusion they did, in spite of the statutes of England, not in consequence of them. The question was one of succession to property in England; and it arose after both the parties to the marriage, which was celebrated abroad, had died abroad; it being understood, however, that their domicil was all the while in England. Their lordships deemed, that some of the statutes passed in the reign of Henry VIII., anterior to Stat. 32 Hen. 8, c. 38,[1] should be construed in connection with this one, even supposing them to be entirely repealed, as they are generally understood to be;[2] the effect of which, their lordships considered, was to incorporate into the law of England the principle which holds the marriage of a man with the sister of his deceased wife to be a violation of "God's law." Therefore — so the argument ran — an English judicial tribunal was bound to hold such a marriage to be violative, not only of the English law, but also of the law of God; and no judge would be authorized to tolerate, in any way, a violation of the law of God, where it was likewise a violation of the law of England. The case would consequently come within a principle analogous to the one which holds foreign marriages to be void when contrary to the law of nature. Within this principle, had the man married abroad his own sister, instead of the sister of his deceased wife, the marriage would, according to all authority, have been void in England.[3]

§ 381. **Continued.** — But the difficulty attending this view, according to which the question was one of mere English local

[1] Ante, § 108, 314.

[2] On this question of repeal, see also Wing *v.* Taylor, 2 Swab. & T. 278.

[3] Ante, § 377.

law, not in any way connected with international jurisprudence, therefore of no consequence in the United States, is, that, though the point did not occur to their lordships, or, if it did occur, was deemed to be undeserving of mention, ever after the statute of 32 Hen. 8, c. 38, was passed, down to the passing, in 1835, of Stat. 5 & 6 Will. 4, c. 54, a period of 295 years, the courts of England — all the courts, low and high — had been winking at this violation of God's law and the law of the land, by holding just such a marriage as this to be good when celebrated in England, and when the question came up, as in this case it did, after the death of the parties, or one of them. In other words, until 1835, the marriage of a man with the sister of his deceased wife, celebrated in England, was voidable, and not void; and, had this very marriage taken place in England, as it did abroad, at a date anterior to 1835, the English courts, even at the date when this case was decided, would have adjudged this particular case, and they did adjudge all others of the like sort, the other way. This proposition was entirely plain, undisputed, and known to all persons familiar with the English law.[1] It is difficult to write soberly about this case, wherein the high court of last resort, composed of the most eminent judges, honored equally at home and abroad, pronounced a decision in apparent oblivion of the course which justice had taken for ages in their own courts, ignoring alike acts of Parliament and judicial decisions. Though it is plain that this fact ought to take from the case the weight it otherwise would have with us, it still becomes necessary we should look into it further.

§ 382. **Continued.** — How, then, stood the question upon Stat. 5 & 6 Will. 4, c. 54? This statute is in three sections, the second and third of which have already been quoted.[2] The first section, with the preamble, is as follows: "Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting

[1] Ante, § 105, 112, 320; post, § 382, 386.

[2] Ante, § 398.

that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable; Be it therefore enacted, &c., That all marriages which shall have been celebrated before the passing of this act between persons being within the prohibited degrees of affinity shall not hereafter be annulled for that cause by any sentence of the ecclesiastical court, unless pronounced in a suit which shall be depending at the time of the passing of this act: Provided, that nothing hereinbefore enacted shall affect marriages between persons being within the prohibited degrees of consanguinity." The second section, as we have already seen, makes the marriages of both kinds, "which shall hereafter be celebrated," void, instead of voidable, as they had previously been.

§ 383. **Continued.** — The marriage which was under consideration in this case was one within the forbidden degrees, not of consanguinity, but of affinity. And the legislature, in this statute, without, we are to infer from the opinions in the case under review, the fear of God before its eyes, had confirmed those marriages already celebrated which, as the lords now urged, were flagrant violations of God's law; so that not even in a direct proceeding for the purpose could they, though celebrated in England before the passage of the statute, be set aside. This was an expression of the legislative judgment on one point, namely, that, "God's law" to the contrary notwithstanding, if parties within the prohibited degrees of affinity had entered into a form of marriage, true policy and right justice demanded that the marriage should thereafter be held to be good. Upon this principle, as these parties had entered into what was a good marriage in the place in which it was solemnized, and as they had lived and become the parents of children in such place, true policy and right judgment demanded that it should be held good ever after, in England as well as elsewhere. This is the spirit of Stat. 5 & 6 Will. 4, c. 54; and the statute, moreover, in the true spirit of the international private law on this subject, distinguished these cases of affinity from cases of consanguinity, making the one class of marriages already celebrated valid, and leaving the other as they were before the statute, voidable. Their lordships ex-

pressed approbation of some observations made by the consulted judges, through Chief Justice Tindal, in the Sussex Peerage Case, upon the interpretation of statutes. And as those observations seem also to the writer of these volumes to be judicious, he will quote him here: "The only rule for the construction of acts of Parliament," said the Chief Justice, "is that they should be construed according to the intent of the Parliament which passed the act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer, is 'a key to open the minds of the makers of the act, and the mischiefs which they intended to redress.'"[1] Now, if we look at the whole statute of 5 & 6 Will. 4, c. 54, including the preamble, we shall see, that, since the statute confirmed the voidable marriages of parties within the prohibited degrees of affinity, already celebrated in England, terming it "unreasonable" to pursue any other course, and expressing no horror at such a violation of what the judges in this case of Brook *v.* Brook deemed to be the law of God, — it conveyed thereby the clear "intent" to have "God's law" disregarded, and "reason" followed, whenever a question of construction, involving the like principle, should thereafter arise. And indeed it seems marvellous that their lordships, after having seen the whole power of the kingdom, as put forth alike in legislative act and judicial decision, sanction for some three hundred years this lamentable violation of "God's law" as they termed it, should, having thus witnessed the swallowing of cartload after cartload of the irreligious English camel, without rebuking the transaction, now turn, and strain out from the precious liquid jurisprudence of the kingdom the unconsecrated foreign gnat.

§ 384. **Continued.** — There is another noticeable and strange thing in this case. The counsel who sought to sustain this

[1] Sussex Peerage Case, 11 Cl. & F. 85, 143.

marriage cited among other authorities some decisions by American courts, one of which was the Massachusetts case of Sutton *v.* Warren.[1] The facts of this case were, that a nephew and aunt intermarried, in England, where they were domiciled, being English people; and, after residing there as husband and wife about a year, removed to Massachusetts, where they dwelt together in the same relation. The husband gave to this wife his note for $1,300, and she sued him on it at law. He set up coverture in defence; and, the marriage having taken place anterior to the enactment of Stat. 5 & 6 Will. 4, c. 54, and therefore being voidable and not void in England, and this being a collateral proceeding and not a suit to set the marriage aside as incestuous, the Massachusetts court decided the question precisely as it would have been decided in England had it arisen there either before or after the passing of this statute, the marriage having there taken place before; namely, held the plea of coverture to be good.[2] Aside from the view of the case to be derived from the principles of private international law, we had brought with us to this country the English municipal law as it stood at the time of the original settlements of the colonies; and, according to this law, if it remained with us unaltered, the court was required to decide the case as it did, because thus the English courts, had the question arisen in England, would have been compelled to decide it. This was plain; it was so, as we have seen, in respect of marriages celebrated when this was, after Stat. 5 & 6 Will. 4, c. 54, as well as before, and the law on this point is not changed in England to the present day; and, happily for the intelligence of the English profession, there is not in all the kingdom to be found a barrister so ignorant as not to know that, had this question been taken before any competent English tribunal at any time within the last three hundred years, down to and including the very moment when the House of Lords was sitting judicially upon this case of Brook *v.* Brook, it would have been decided precisely as it was decided in Massachusetts. But in Massachusetts, — and this was the only point of doubt, — there was a statute making marriages of this kind void. The Massachu-

[1] Sutton *v.* Warren, 10 Met. 451. See ante, § 117, 377.

[2] Ante, § 381.

setts court held this statute to apply to domestic marriages only, and not to marriages celebrated in England between English subjects.

§ 385. **Continued.** — But their lordships, in particular the Lord Chancellor, were not pleased with this their own law, when they saw it reflected back to them from over the Atlantic mirror. Said the Lord Chancellor: "The decision in this case was pronounced in 1845. I am sorry to say, that it rather detracts from the high respect with which I have been in the habit of regarding American decisions resting upon general jurisprudence. The question was, whether a marriage celebrated in England on the 24th of November, 1834, between Samuel Sutton and Ann Hills, was to be held to be a valid marriage in the State of Massachusetts. The parties stood to each other in the relation of aunt and nephew, Ann Hills being own sister to the mother of Samuel Sutton. They were both natives of England, and domiciled in England at the time of their marriage. About a year after their marriage they went to America, and resided as man and wife in the State of Massachusetts. By the law of that State a marriage between an aunt and her nephew is prohibited, and is declared null and void. Nevertheless, the Supreme Court of Massachusetts held that this was [in this collateral proceeding] to be considered a valid marriage in Massachusetts [just as the House of Lords in England would have done, had the parties been in England, and the same case gone by appeal before this highest English tribunal]. But I am bound to say, that the decision proceeded on a total misapprehension of the law of England. Justice Hubbard, who delivered the judgment of the court, considered that such a marriage was not contrary to the law of England. [Justice Hubbard considered no such thing, if the language employed by him, in giving the opinion of the court, is to be taken as evidence of what he thought. His words are: "By the law of England, this marriage, at the time it was contracted, viz. in November, 1834, was voidable only, and could not be avoided until a sentence of nullity should be obtained in the spiritual court, in a suit instituted for that purpose."] Now there can be no doubt that, although contracted before the passing of 5 & 6 Will. 4, c. 54, it was contrary to the law of

England, and might have been set aside as incestuous [so Justice Hubbard said it might], and that act gave no protection whatever to a marriage within the prohibited degrees of consanguinity; so that, if Samuel Sutton and Ann Hills were now to return to England, their marriage might still be declared null and void [so said Justice Hubbard, but the proceeding before the Massachusetts tribunal was not one to declare it null and void; and, as already observed, the Massachusetts court decided the question precisely as the House of Lords would have done], and they might be proceeded against for incest. If this case is to be considered well decided and an authority to be followed, a marriage contrary to the law of the State in which it was celebrated, and in which the parties were domiciled, is to be held valid in another State into which they emigrate, although by the law of this State, as well as of the State of celebration and domicil, such a marriage is prohibited and declared to be null and void. [What ground there is in the case from which to draw such an inference, the reader has already seen. But he will relish the conclusion to which the lord of the woolsack arrived.] This decision, my lords, may alarm us at the consequences which might follow from adopting foreign notions on such subjects, rather than adhering to the principles which have guided us and our fathers ever since the Reformation"![1]

§ 386. **Continued.** — To what extent these marriages, voidable by reason of canonical impediment, were contrary to the law of England, we have already seen in part; but another English case, referred to also in this case of Brook *v.* Brook, and not dissented from, sheds further light on the subject. A man had married his deceased wife's sister, and had children by both his first and second marriage. This was before the passage of Stat. 5 & 6 Will. 4, c. 54, though the decision in the case was afterward. Some person interested in the inheritance proposed to avoid the second marriage by proceedings in the ecclesiastical court; and, to prevent this, a family arrangement with regard to the property was made, the party interested in avoiding the marriage agreeing not to undertake such proceedings; and this agreement was held, in the English Court of Chancery,

[1] Brook *v.* Brook, 9 H. L. Cas. 193, 220, 221.

not to be invalid as against the policy of the law. Said Lord Chancellor Sugden: "The policy of the law (I do not now allude to the recent statute), did not go so far as to declare such marriages absolutely null and void; but it left the matter open, to have them avoided or not, as persons interested thought proper to take, or to omit to take, the steps necessary for the purpose. But on the other hand, in the event of the death of either party, before effectual proceedings were taken to avoid the marriage, no one could afterwards dispute its validity. The policy of the law, therefore, so far from declaring such contracts void, actually provided that a period must arrive at which such marriages, if not before that time disturbed, became as effectual to all purposes as if there had not been originally any imperfection in them."[1] According, therefore, to this very sound view of the English law, when the parties to the marriage which was in controversy in the Massachusetts case of Sutton *v.* Warren, had placed themselves beyond the jurisdiction of the English ecclesiastical courts, the marriage was, by the law of England, made perfect; or, in the language of this lord chancellor, it "became" — that is, under the English law — "as effectual to all purposes as if there had not been originally any imperfection in" it. Whether, consequently, the principles of the English law should, if admitted in Massachusetts, have led to the marriage being held to be even voidable here, rather than perfected beyond all further inquiry, is not a point so clear as to have justly subjected the Massachusetts tribunal to censure, had it followed the view deducible from the chancery decision, rather than the one deducible from the decision in the House of Lords.

§ 387. **Continued.** — But does not the English law hold, that marriages of the kind now in contemplation are violative of the law of nature, and on this ground void, thus extending the line of distinction further out among the collaterals than was intimated in a previous section?[2] No. If there is any difference, the English law carries this matter less far among the collaterals than our own. Thus, in a very leading English case, it was said of incest among collaterals: "This is not, strictly

[1] Westby *v.* Westby, 2 Dru. & W. 502, 515, 516.

[2] Ante, § 377.

speaking, contrary to the law of nature; for then mankind could not have been propagated from one common stock, without a breach of the law of nature. Besides that, this very usage of marrying sisters was practised by the patriarchs and good men of old, without any note of blame, as Jacob married Rachel and Leah; nay, there is one case wherein 'tis expressly commanded, and that is, where the elder brother dies without issue, that the younger brother must marry the deceased brother's wife, to raise up seed unto his brother; the meaning of which is, that the children begotten by such second marriage were to bear the brother's name, and take his inheritance. But though incest among collaterals is not contrary to the law of nature, yet 'tis contrary to the positive law of God, which is likewise established upon very strong reasons."[1] Still, it can hardly be doubted that, notwithstanding these observations, had a man married in England his own sister, previous to Stat. 5 & 6 Will. 4, c. 54, the marriage would have been held void, and not merely voidable, being, in the English judicial estimation, violative of a law of nature.

§ 388. **Continued.** — This extended discussion of doctrines broached or involved in the case of Brook *v.* Brook must be brought to a close. In the House of Lords, the case did not seem to be likened to the Sussex Peerage Case. In this latter case, Stat. 12 Geo. 3, c. 11, § 1, had declared, "That no descendant of the body of his late Majesty King George the Second, male or female (other than the issue of princesses who have married or may hereafter marry into foreign families), shall be capable of contracting matrimony without the previous consent of his Majesty, his heirs or successors, signified under the Great Seal and declared in Council," &c., "and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void." And it was decided that this statute created a personal incapacity — the words being, "shall be [in-] capable of contracting matrimony" — in the particular persons to whom this special statute applied; which incapacity attended them wherever they went, whether out of the English dominions or within. Said Lord Brougham: "Parties are rendered

[1] Butler *v.* Gastrill, Gilb. Ch. 156, 157.

incapable of contracting matrimony, and not merely, as in the case of Lord Hardwicke's act, the marriage rendered null and void." [1] It was not thought that the statute of William created this personal incapacity in all the subjects of the crown. But if any general doctrine can be drawn from the discussion it is this, — that, where the law of England forbids certain classes of persons to intermarry, and provides the penalty of nullity for cases of disobedience, yet English persons go abroad and marry in contravention of the law, still retaining their English domicil, the marriage will be held to be, in England, void. Yet if the English prohibition extends only to the form of solemnizing the marriage, or to such an incident as the consent of parents, making the marriage void when the form is not observed or the parental consent is not obtained, then, should English persons go abroad and marry contrary to such a law, their marriage will be good in England even though they retain their English domicil.[2] Still it is difficult to see how the unwritten law can distinguish, where a statute does not, in favor of cases in which minors disregard the command of Jehovah as expressed in the decalogue, "Honor thy father and thy mother," and contract a marriage in violation of the parental authority; and against cases wherein a widower obeying the law given to the patriarchs marries the sister of his deceased wife. English jurisprudence may distinguish here; it is to be hoped that many years may pass by before the American decisions follow. If a man, who, domiciled abroad, marries there the sister of his deceased wife, comes with her to reside in England, this English case of Brook *v.* Brook does not hold the marriage to be, in England, void.

§ 389. **American Doctrine adverse to Brook *v.* Brook.** — In our own State of Kentucky, under facts similar to those involved in the case of Brook *v.* Brook, the court has held, as already noticed, directly the opposite doctrine to what was arrived at in the House of Lords.[3] Between these two decisions the judicial mind, in future cases, will choose. The one degrades, as far as a decision can, marriage from its high

[1] Sussex Peerage Case, 11 Cl. & F. 85, 151.

[2] Brook *v.* Brook, 9 H. L. Cas. 193.

[3] Stevenson *v.* Gray, 17 B. Monr. 193; ante, § 371.

place as a thing of international law, to be held and revered alike in all countries, into the subordinate place of a despised object, which in one country is set up and cemented, and in another country is kicked to pieces; in the first, is then put together; in the second, is again knocked asunder; in some localities, is one thing; in others, another thing; and in no locality is more than a mere local affair. The true rule is, that, when a marriage is celebrated abroad, if it accords with the local law prevailing at the place of its celebration, and with the international marriage law, it is good in the place of the parties' domicil; otherwise, it is bad. And this reference to the international marriage law teaches us why, when a marriage is polygamous, or is by the law of nature incestuous, it is held to be everywhere void. All nations concur in holding that such an impediment nullifies the marriage, therefore the law which gives it this effect is a part of the law of nations. But all nations do not hold, that, when a man has ceased to have a wife, he is still so connected with the blood of her who was once his wife, as to be debarred the privilege of marrying one who was formerly, while she dwelt in flesh and blood, one of her blood relations.

III. *That a Marriage invalid where celebrated is everywhere invalid.*

§ 390. **General Doctrine — Exceptions.** — Equally true with the proposition, that a marriage valid by the law of the place of its celebration is valid everywhere, is, as a general rule, the converse of it; namely, that a marriage invalid where it is celebrated is everywhere invalid.[1] This latter branch of the doctrine, however, seems, at the first impression, subject to more numerous exceptions than the former. And Lord Stowell has said: "It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid by the law of the place where it is celebrated, is good everywhere else; but they have not, *e converso*, established, that marriages of

[1] See cases cited ante, § 355; Ferg. Consist. Law, 18, 28, 29; Greenwood *v.* Curtis, 6 Mass. 358, 378; Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 4 Eng. Ec. 485; Kent *v.* Burgess, 11 Sim. 361; McCulloch *v.* McCulloch, Ferg. 257, 3 Eng. Ec. 419.

British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England. It is, therefore, certainly to be advised, that the safest course is always to be married according to the law of the country, for then no question can be stirred; but, if this cannot be done, on account of legal and religious difficulties, the law of this country does not say that its subjects shall not be married abroad. And even in cases where no difficulties of that insuperable magnitude exist, yet, if a contrary practice has been sanctioned by long acquiescence and acceptance of the one country that has silently permitted such marriages, and of the other that has silently accepted them, the courts of this country, I presume, would not incline to shake their validity upon these large and general theories, encountered as they are by numerous exceptions in the practice of nations."[1]

§ 391. **Exceptions, continued.** — In the last two periods, this learned judge has mentioned nearly all the exceptions to the general rule. They are, First, cases in which the parties cannot contract marriage in accordance with the local law where they are. Secondly, those wherein, on various grounds, a local law has sprung up in the foreign country, applicable to sojourners from other countries, under which they are married, differing from the general *lex loci contractus*, yet recognized as well by it as by the law of their domicil. To which may be added, Thirdly, the very case under the consideration of the learned judge when the foregoing observations fell from him; namely, that of a victorious invading army, carrying with it the laws of its own country, for the protection of persons within its lines and the general range of its dominion. But only the first exception, the reader perceives, is a real one. Under the second and third exceptions, the marriage is according to a law, not indeed the general one, recognized at the place of its celebration. Let us look at these exceptions in their order.

§ 392. First. *If parties are sojourning in a foreign country, where the local law makes it impossible for them to contract a*

[1] Ruding *v.* Smith, 2 Hag. Con. 371, 4 Eng. Ec. 551, 560. See Newbury *v.* Brunswick, 2 Vt. 151.

lawful marriage under it, they may marry in their own forms, and the marriage will be recognized at home as valid: —[1]

Why? Doctrine defined and limited. — This doctrine comes from the proposition, that the right to marry is a natural one, and no government can justly take it away from its own subjects, much less from the subjects of a foreign power. As, therefore, in these cases in which it is impossible to marry according to the *lex loci*, the right to marry nevertheless exists, the great law of necessity to which all other laws bend,[2] compels the courts of all nations to recognize as valid a marriage not conforming, because it could not, to the *lex loci*. Consequently, in the discussion of a divorce bill in the House of Lords, Lord Eldon expressed a doubt concerning the validity of a marriage celebrated at Rome, by a Protestant clergyman, both parties being Protestants; and said, that, where persons are married abroad, it is necessary to show a celebration of the marriage according to the *lex loci*, or to show that there was no *lex loci*. But a Roman Catholic clergyman produced at the bar of the house swore, that, at Rome, two Protestants could not marry according to the *lex loci*, because no Catholic clergyman would perform the ceremony; whereupon the marriage was held to be good.[3] And, in the case of The Queen *v.* Millis, Lord Campbell mentioned it as having been repeatedly held, and expressed no doubt of its being the law, that, in circumstances where it is utterly impossible to procure the presence of a priest, there may be a valid marriage by the mere consent of the parties.[4] But if Protestants at Rome, for instance, choose to abjure their religion and connect themselves

[1] Rogers Ec. Law, 652; Poynter Mar. & Div. 289; Kent *v.* Burgess, 11 Sim. 361.

[2] 1 Bishop Crim. Law, 5th ed. 54, 346–355, 824.

[3] Lord Cloncurry's Case, Cruise on Dignities, 276, Wadd. Dig. 238, note. This case, as I understand it, proceeded on the assumption that the marriage would have been held null at Rome. In the Sussex Peerage Case, 11 Cl. & F. 85, 152, the evidence was, that a marriage at Rome between English Protestants, according to the rites of their own church, would be recognized as good by the authorities of Rome. Lord Campbell expressed surprise at the evidence. But, if this be so, it only shows that the authorities there recognize the *jus gentium* (see post, § 393–395) by which the religious scruples of foreigners, in matters of marriage, are regarded. See also Lockwood *v.* Lockwood, Wadd. Dig. 238; Hossack Confl. Laws, 146, 147. And see post, § 396.

[4] Reg. *v.* Millis, 10 Cl. & F. 534, 786. s. p. Beamish *v.* Beamish, 9 H. L. Cas. 274.

with the Catholic Church, for the sole purpose of entering into a marriage, the marriage will be good, contracted thus according to the local law.[1] The reader will observe, that the doctrine of this section does not necessarily extend beyond cases in which the persons, undertaking to contract a marriage contrary to the law of the place, are sojourning there for some purpose other than merely to contract a marriage contrary to their own law. And, though the point seems not to be adjudicated, we may presume the courts of our own country would not recognize these marriages from necessity as good, if entered into by persons resorting to the place of impossibility for the purpose of evading the law of their domicil. Not being good by any local law, they should not be deemed good by the international law of marriage.[2]

§ 393. Secondly. *If, in the place of celebration, there is a special local law, differing from the general law of the place permitting foreigners to marry in a way peculiar to themselves, and making the marriage good, foreign persons who are there may avail themselves of it, and their marriages, if not contrary to the law of their domicil, will be good also at home: —*

[1] Swift *v.* Kelly, 3 Knapp, 257.

[2] And see post, § 398–400. There was a United States case, before one of the district courts, which according to the United States Digest was as follows: "Citizens of a State whose laws impose restrictions upon the mode of celebrating a marriage, cannot purposely go to a place beyond its jurisdiction, and not within the jurisdiction of another State, — as, for instance, at sea, — and there contract a marriage in a manner contrary to the laws of the State of their residence, and afterwards have such marriage sustained by the courts within it. Such an attempt to be joined in marriage should be deemed a fraudulent evasion of the laws to which the parties owe obedience, and ought not to be held valid. 1870, Holmes *v.* Holmes, 1 Abb. U. S. 525." Without questioning the correctness of this digest of the case, I will observe, that, on looking into the report, I do not find much of interest upon this point. It in a measure relates to one of the doctrines discussed under our first sub-title, and, as to it, the better doctrine is not as this digest would indicate. Still, in principle, there is a difference between going to a place, as upon the high seas, where no municipal law exists, and going to an inhabited country governed by a foreign power, to contract a marriage, whether in what is called evasion of the parties' own law, or not. If parties go upon the high seas, beyond territorial jurisdiction, to marry, there are two conflicting theories about the marriage which may be maintained; the one, that, like colonists, they take their own marriage laws with them, and must conform to those laws, or the marriage will be void; the other, that, being outside municipal law, the marriage may be celebrated according to the *jus gentium*, and it will be good. To me, it appears that the one or the other of these theories should be applied, according to the circumstances of the particular case.

Reason and Limits of the Doctrine. — Upon this subject Lord Stowell, in the leading case of Ruding *v.* Smith,[1] already referred to, discoursed as follows: "It is observed by the learned Dr. Hyde, that there is in every country a body of inhabitants, formerly much more numerous than at present (and now generally allowed to be of foreign extraction), having a language and usages of their own, leading an erratic life, and distinguished by the different names of *Egyptians*, *Bohemians*, *Zingarians*, and other names, in the countries where they live. Upon such persons the general law of the country operates very slightly, except to restrain them from injurious crimes; and the matrimonial law hardly, I presume, in fact, anywhere at all. In our own country and in many others, there is another body, much more numerous and respectable, distinguished by a still greater singularity of usages, who, though native subjects, under the protection of the general law, are in many respects governed by institutions of their own, and particularly in their marriages; for, it being the practice of mankind to consecrate their marriages by religious ceremonies, the differences of religion, in all countries that admit residents professing religions essentially different, unavoidably introduce exceptions, in that matter, to the universality of that rule which makes mere domicil the constituent of an unlimited subjection to the ordinary law of the country.

§ 394. **Continued.** — "The true statement of the case results to this, that the exceptions, when admitted, furnish the real law for the excepted cases; the general law steers wide of them. The matrimonial law of England for the Jews is their own matrimonial law; and an English Court Christian, examining the validity of an English Jew marriage, would examine it by that law, and by that law only, as has been done in the cases that were determined in this court on those very principles.[2] If a rule of that law be, that the fact of a witness to

[1] Ruding *v.* Smith, 2 Hag. Con. 371, 4 Eng. Ec. 551, 557. Mr. Burge remarks, that "there seems to be an inclination in the courts of England, where the marriage of two British subjects in a foreign country is not sustainable by the law of that country, to ascertain whether it is valid according to the law of England." 1 Burge Col. & For. Laws, 199.

[2] Lindo *v.* Belisario, 1 Hag. Con. 216, 4 Eng. Ec. 367; Goldsmid *v.* Bromer, 1 Hag. Con. 324, 4 Eng. Ec. 422.

the marriage having eaten prohibited viands, or profaning the Sabbath day, would vitiate that marriage itself, an English court would give it that effect, when duly proved, though a total stranger to any such effect upon an English marriage generally. I presume, that a Dutch tribunal would treat the marriage of a Dutch Jew in a similar way, not by referring to the general law of the Dutch Protestant consistory, but to the ritual of the Dutch Jews established in Holland.

§ 395. **Continued.** — "What is the law of marriages, in all foreign establishments, settled in countries professing a religion essentially different? In the English factories at Lisbon, Leghorn, Oporto, Cadiz, and in the factories in the East, Smyrna, Aleppo, and others, in all of which (some of these establishments existing by authority under treaties, and others under indulgence and toleration) marriages are regulated by the law of the original country, to which they are still considered to belong. An English resident at St. Petersburg does not look to the ritual of the Greek Church, but to the rubric of the Church of England, when he contracts a marriage with an Englishwoman.[1] Nobody can suppose, that, whilst the Mogul empire existed, an Englishman was bound to consult the Koran, for the celebration of his marriage. Even where no foreign connection can be ascribed, a respect is shown to the opinions and practice of a distinct people. The validity of a Greek marriage, in the extensive dominions of Turkey, is left to depend, I presume, upon their own canons, without any reference to Mahometan ceremonies. There is a *jus gentium* upon this matter, — a comity, which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in this transaction of marriage. It may be difficult to say *a priori*, how far the general law should circumscribe its own authority in this matter; but practice has established the principle in several instances; and, where the practice is admitted, it is entitled to acceptance and respect. It has sanctioned the marriages of foreign subjects, in the houses of the embassadors of the foreign country to which they belong. I am not aware of any judicial recognition upon the point;

1 "A register of English marriages, celebrated at St. Petersburg, is transmitted to the registry of the Consistory Court of London."

but the reputation which the validity of such marriages has acquired makes such a recognition by no means improbable, if such a question was brought to judgment." [1]

§ 396. **Continued.** — Therefore the cases under this head proceed on the express ground, that the local law, being presumed to recognize the *jus gentium* on the subject, sanctions the marriage. And where the fact is made to appear that it does not, yet provides a way of its own, there is the same necessity for resident foreigners and transient persons as for any others to conform to it, in order for their marriages to be held valid in their own country.[2] And if merely the local law is more strict and burdensome in its requirements than their own, while it provides a way in which the relation can be lawfully created, it must be followed, for the marriage to be good at home.[3] Yet intimations have been made, that, if it imposes a very unreasonable burden, as by requiring the consent of parents and fixing the age of majority at thirty or forty years, this burden will be equivalent to an impossibility, rendering the marriage good without compliance with the requirement.[4] And we have seen, that English subjects at Rome would not be obliged by the English law to become Catholics, for the purpose of con-

[1] Ruding *v.* Smith, 2 Hag. Con. 371, 384, 4 Eng. Ec. 551, 557. In Prentiss *v.* Tudor, 1 Hag. Con. 136, it was considered that the privilege of an embassador's chapel would extend only to cases where both parties are subjects of the country of the embassador. See 2 Roper Hus. & Wife, by Jacob, 498; 1 Burge Col. & For. Laws, 168. Marriages in presence of a *consul* are not protected under this rule. Kent *v.* Burgess, 11 Sim. 361. The following passage, from Story's Conflict of Laws, § 2*a*, will serve to illustrate this subject: "When the Northern nations, by their irruptions, finally succeeded in establishing themselves in the Roman empire and the dependent nations subjected to its sway, they seem to have adopted, either by design or from accident or necessity, the policy of allowing the different races to live together, and to be governed by and to preserve their own separate manners, laws, and institutions, in their mutual intercourse. While the conquerors, the Goths, Burgundians, Franks, and Lombards, maintained their own laws and usages and customs over their own race, they silently or expressly allowed each of the races over whom they had obtained an absolute sovereignty to regulate their own private rights and affairs according to their own municipal jurisprudence. It has accordingly been remarked by a most learned and eminent jurist, that from this state of society arose that condition of civil rights denominated personal rights, or personal laws, in opposition to territorial laws."

[2] Lord Ellenborough, in Rex *v.* Brampton, 10 East, 282, 286; Buller *v.* Freeman, Amb. 301, 303; Roach *v.* Garvan, 1 Ves. sen. 157; Rogers Ec. Law, 2d ed. 650; 2 Roper Hus. & Wife, by Jacob, 497.

[3] Rogers Ec. Law, 2d ed. 651.

[4] Ruding *v.* Smith, 2 Hag. Con. 371, 4 Eng. Ec. 551; ante, § 392.

tracting marriage in accordance with the *lex loci*.[1] But in the case of Kent *v.* Burgess, the point being strongly urged by counsel, that the marriage, celebrated in Belgium without a compliance with the *lex loci*, should be held good because by the Belgian law the parties could not marry until they had been in the country six months, while at the time this marriage took place they had not been there for so long a period; and because, by that law, in which the age of majority was twenty-five, the consent of parents was required, while the age of this husband was but twenty-four, — the Vice-Chancellor, evidently impressed with the general truth of the proposition, which was likewise conceded by the opposite counsel, said, that here there was no insuperable difficulty preventing the marriage from being celebrated according to Belgian law, and he therefore held it void.[2]

§ 397. **How in England by Statute, &c.** — In England, by a statute of date subsequent to the foregoing decisions, the marriages of British subjects solemnized by a minister of the Church of England, in the chapel or house of any British embassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory; together with all marriages solemnized within the British lines, by any chaplain or other person officiating under the orders of the commanding officer of a British army abroad; are, to remove all doubts, declared to be valid.[3] It has been held, that, under this statute, contrary to the common-law rule, the marriages referred to are good when but one of the parties is a British subject.[4]

§ 398. **How in this Country.** — In the United States, there has been some discussion of the question, whether our consuls abroad can celebrate valid marriages between parties, one or both of whom are American; and the result seems to be, that, as a question pertaining to the unwritten law, they can, or cannot, according as the local law of the place of celebration accepts or rejects such marriages. There are some opinions of a

[1] Ante, § 392.

[2] Kent *v.* Burgess, 11 Sim. 361.

[3] 4 Geo. 4, c. 91. See Shelford Mar. & Div. 78–87.

[4] Lloyd *v.* Petitjean, 2 Curt. Ec. 251, 7 Eng. Ec. 105. See ante, § 395, note.

late attorney-general of the United States on the subject;[1] but it came not long ago under judicial cognizance, in a Massachusetts case. There, a marriage of an American man to a German lady had been celebrated before the American consul at Frankfort-on-the-Main; and, upon a consideration of the testimony and the law, this marriage was held to be good. Two lawyers of Frankfort had been examined on each side; and the two legal witnesses against the marriage declared, that it would not be held good at Frankfort, yet they cited no authorities to the point. The two witnesses on the other side deemed that the marriage would be good, and they showed that the American consul had celebrated many such marriages, and that the German tribunals had sustained them. The Massachusetts court decided in accordance with this latter opinion; it being sustained also by an examination of the written marriage law of Frankfort, which, in its provisions, could not well be applied to any but domiciled persons, leaving, therefore, the inference almost inevitable that it was not intended by the maker to furnish a rule for transient foreigners.[2] At present, this matter with us is regulated by an act of Congress which provides: "That all marriages in the presence of any consular officer, in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia, shall have the same force and effect, and shall be valid to all intents and purposes, as if the said marriage had been solemnized within the United States. And in all cases of marriage before any consular officer, the said consular officer shall give to each of the parties a certificate of such marriage, and shall also send a certificate thereof to the Department of State, there to be kept; which certificate shall specify the names of the parties, their ages, places of birth, and residence."[3] Though, as we have seen,[4] marriage is, within the territorial bounds of the States, a thing exclusively of State cognizance, over which the national government has no control, yet, outside of State limits, the States are not legally known; in foreign countries and on the high seas the power of the United States, in distinction from

[1] 7 Opinions Att'y-Gen. 18, 342.

[2] Loring *v.* Thorndike, 5 Allen, 257.

[3] Stat. 1860, c. 179, § 31, 12 Stats. at Large, 79.

[4] Ante, § 87, 88.

the power of the States, is exclusively exercised; consequently, beyond doubt, this act of Congress is within the legislative jurisdiction of the United States, and is therefore a valid and binding act.

§ 399. Thirdly. *An invading army carries with it the law of the country to which it belongs; and if, while hostilities are progressing, a marriage is celebrated within its lines, it need not conform to the law of the invaded country:* —

Nature and Limits of the Doctrine. — This proposition rests partly on the doctrine, that colonists carry with them wherever they go the law of the mother country, including herein the law matrimonial;[1] partly likewise on an exception to the doctrine, that the laws of a conquered country remain in force until altered by the conquerors.[2] An invading army is not subject to the municipal jurisdiction of the invaded country, but is more nearly in the position of colonists, proceeding under the protection of their own sovereign. And a question has been made, whether, after the invaded country has surrendered, the subjects of the conquering country in it are bound by its laws, as the original inhabitants are, until their sovereign has had the opportunity to examine them, and to alter them if deemed unsuited to his own subjects.[3]

§ 400. **Continued.** — It was therefore intimated, in a case which never reached a decision, that the law of France might not apply to an officer of the English army of occupation, between whom and an English lady a marriage was celebrated by the chaplain of the army; because the parties were not under the dominion of the French law.[4] And in Ruding *v.* Smith, the marriage between two British subjects was held to be good, where, after the English army had invaded a Dutch province at the Cape of Good Hope, and it had surrendered, but was not ceded to the British crown, and was awaiting a treaty of peace, the nuptials were performed by the chaplain of

[1] Lautour *v.* Teesdale, 8 Taunt. 830; ante, § 67, 68.

[2] Calvin's Case, 7 Co. 1, 17 *b*; Campbell *v.* Hall, Cowp. 204, 209; Fowler *v.* Smith, 2 Cal. 39.

[3] See the whole of the masterly judgment of Lord Stowell in Ruding *v.* Smith, 2 Hag. Con. 371, 4 Eng. Ec. 551.

[4] Burn *v.* Farrar, 2 Hag. Con. 369, 4 Eng. Ec. 550. See also Ruding *v.* Smith, 2 Hag. Con. 371, 4 Eng. Ec. 551.

the British garrison, under a license from the commander-in-chief. Some other points were discussed in this case; such as, that, the parties being minors, the Dutch law of minority was an unreasonable one;[1] but it evidently turned on the question as above stated.[2] Lord Ellenborough has well said: "I may suppose, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognized by the subjects of England in a place occupied by the king's troops, who would impliedly carry that law with them."[3]

CHAPTER XXII.

SUGGESTIONS AS TO THE CONFLICT IN RESPECT TO PROPERTY RIGHTS.

§ 401. **Purpose and Scope of the Chapter.** — It does not pertain to the subject of these volumes to discuss the property rights resulting from marriage. That is done in the author's work on the "Law of Married Women." In that work, also, the subject of the present chapter is more exactly considered. It is proposed here simply to present such general views as are necessary to supplement the discussions of the last chapter. For there is a distinction, not always present to the minds of lawyers, between the marriage status and the property rights of the parties, as to the conflicting laws of different states and countries.

§ 402. **Doctrine as to the Validity of the Contract — Effect.** — The general rule applicable to all contracts is, that they are valid or not, according as the law of the place where they are

[1] Ante, § 392, 396.

[2] Ruding *v.* Smith, supra. In Kent *v.* Burgess, 11 Sim. 361, 376, the Vice-Chancellor remarked, that the case of Ruding *v.* Smith turned upon the difficulty of effecting a marriage according to the Dutch law. This will appear not wholly inconsistent with the view taken of it in the text, if we consider, that the extreme difficulty, not to say impossibility, of learning the local law, was Lord Stowell's strong argument for deeming British subjects, while under protection of the British troops, not bound to the general municipal law of the foreign country.

[3] Rex *v.* Brampton, 10 East, 282, 288. See 1 Burge Col. & For. Laws, 169.

entered into makes them valid or void.[1] But, in ordinary contracts, if they are made in one place to be performed in another, and by the law of the latter place they would be void while by the law of the former they would be good, they are held to be, in the latter place, void.[2] Likewise, in all cases, though the validity of the contract may be determined by a reference to the law of the place where it was made, and, if it was intended to be performed in such place, its interpretation also, yet the mode of its enforcement and the form of the proceeding will be determined by the law of the place in which the suit is brought. And the contract is to be construed by reference to the law of the place where it is to be performed, if such place appears, or, if not, by the law of the place where it is made;[3] and the law is to be deemed incorporated into the contract, as a part of it.[4]

§ 403. **Contract as violating Local Law — Marriage and other Contracts distinguished.** — Now, it will be obvious to the reader, that, where an ordinary contract is made in locality A, to be performed in locality B, and a party seeks in locality B its enforcement by a judgment of the court, no reason either of policy or of international law exists, why, should the contract be found violative of the ordinary local law prevailing in locality B, the courts of this locality should hold it to be good. It never had any effect where it was made, its performance could not properly be sought there, nothing was to be done, nothing was done, under it there. But in respect to marriage, as regards the marital status, the reason and the fact are both different. There is no such thing possible as parties entering into a present marriage in one place, to have their marital status fixed and determined by the laws prevailing in another place. Thus, if two persons pass the line dividing Vermont from Massachusetts, intending to be married in Vermont, yet

[1] Story Confl. Laws, § 242 et seq.; Bliss *v.* Houghton, 13 N. H. 126; Reddick *v.* Jones, 6 Ire. 107; Hale *v.* New Jersey Steam Navigation Co., 15 Conn. 539; Green *v.* Sarmiento, Pet. C. C. 74; Willings *v.* Consequa, Pet. C. C. 301; Le Roy *v.* Crowninshield, 2 Mason, 151.

[2] Andrews *v.* Pond, 13 Pet. 65, 78.

[3] Wood *v.* Watkinson, 17 Conn. 500, 509; Henry *v.* Sargeant, 13 N. H. 321; Morales *v.* Marigny, 14 La. An. 855; Goddin *v.* Shipley, 7 B. Monr. 575; Broadhead *v.* Noyes, 9 Misso. 55; Dorsey *v.* Hardesty, 9 Misso. 157; Sherman *v.* Gassett, 4 Gilman, 521; Sallee *v.* Chandler, 26 Misso. 124; Hinkley *v.* Marean, 3 Mason, 88; Titus *v.* Hobart, 5 Mason, 378; Beard *v.* Basye, 7 B. Monr. 133, 141; Wood *v.* Malin, 5 Halst. 208.

[4] Reynolds *v.* Hall, 1 Scam. 35.

to have their marriage status only in Massachusetts, when the ceremony is in Vermont performed, the laws of Vermont take immediate cognizance of it, and transfer them from the condition of unmarried people into the status in which the officiating person pronounced them to be, namely, "husband and wife." The rule of contracts, therefore, whereby, if a contract is made in one locality to be performed in another, it is to be deemed void if by the law of the place of its performance it would be so, cannot apply to that contract of marriage which superinduces the status. Hence the doctrines of our last chapter are not divergent from the general doctrines pertaining to the conflict of laws in respect to contracts.

§ 404. **Status and Property Rights, as to conflicting Laws, distinguished — Rules as to Property.** — But in an earlier chapter we saw, "that a difference exists between the marriage status and those property rights which are attendant upon and more or less closely connected with it."[1] Accordingly, if parties are married in one State, intending to take up their matrimonial residence in another, their relations to each other in respect to property will be held, by the courts of the State to which they go, to be properly referable to the ordinary laws of the latter State, being the domicil of their original intention.[2] And where there is an express contract that their mutual relations as to property shall be governed by the law of their intended domicil, yet they afterward change their mind as to removing, and remain in the place where the marriage was celebrated, the courts of this locality will give effect to the property contract. This point was held in a New York case, where the contract was in writing, referring to the law of the intended domicil as furnishing the rule by which the property rights of the parties were to be regulated; and the chancellor, in giving effect to the contract, observed: "It appears to be a well-settled principle of law, in relation to contracts regulating the rights of property consequent upon a marriage, so far at least as personal property is concerned, that, if the parties marry with reference to the laws of a particular place or country, as their future domicil, the law of that place or country is

[1] Ante, § 14.

[2] Laud *v.* Laud, 14 Sm. & M. 99; Carroll *v.* Renich, 7 Sm. & M. 798.

to govern, as the place where the contract is to be carried into full effect. And this must certainly be the correct rule, where the marriage contract in terms refers to the intended domicil of the parties, as the place or country by whose laws their rights under the marriage contract, in reference to property, are to be determined."[1] In respect to real estate, the rights of the parties to the marriage are, in countries governed by the common law, and in the common-law courts, regulated by the law of the place where the land lies.[2] At the same time, there may be circumstances in which a court of equity will enforce its peculiar principles, in favor of wives, as to this class of property situated in other countries, — but the limits of this chapter forbid the discussion to be extended here.[3]

§ 405. **How where the Parties have Separate Domicils — Remove to New Domicil, &c.** — Where no special facts appear, yet at the time of the marriage the husband and wife have separate domicils, the law of the husband's domicil regulates the marital rights as to movable property.[4] And where there is a contract between the parties concerning property, executed at the place of the marriage, they intending to have the matrimonial domicil remain there also, yet afterward they remove into another locality, the courts of this latter locality will give effect to the contract.[5] And where married persons remove from one State to another, there being no specific contract in writing, the courts of the new domicil will take into view the laws of the State where they formerly resided in determining their mutual rights of property.[6] But it appears, that, after a removal, the subsequent acquisitions of the parties will be governed by the general law of the place in which they thus subsequently reside, — which proposition, while it is doubtless true as respects cases wherein there is no express contract, may not hold good in all instances where the contract is

[1] Le Breton *v.* Miles, 8 Paige, 261, 265, Walworth, Chancellor. And see Peak *v.* Ligon, 10 Yerg. 469; Jones *v.* Ætna Insurance Co., 14 Conn. 501.

[2] Vertner *v.* Humphreys, 14 Sm. & M. 130.

[3] See further on this point, Castro *v.* Illies, 22 Texas, 479; Depas *v.* Mayo, 11 Misso. 314.

[4] Layne *v.* Pardee, 2 Swan, 232.

[5] De Lane *v.* Moore, 14 How. U. S. 253; Dougherty *v.* Snyder, 15 S. & R. 84.

[6] Martin *v.* Boler, 13 La. An. 369; Beard *v.* Basye, 7 B. Monr. 133.

express, that is, where it particularly defines what shall be the rule as to acquisitions.[1]

§ 406. **Limits and Qualifications of Doctrine.** — These propositions, which are not intended to exhaust the subject, are drawn, as the reader perceives from the cases cited in the notes, out of our own fountain of American decided law. Yet there may be, in an individual instance, some good reason why the court cannot, or should not, carry out the doctrine which the general proposition would indicate. As it always follows its own form of procedure,[2] it may not have any form adapted to the enforcement of the right which the foreign law, or the foreign contract, has established; and for this reason the right may fail. Or the thing claimed may be contrary to the policy of the law of the court in which the claim is attempted to be maintained, and in this instance it will not be allowed.[3] And there may be other obstacles in the way; but, where these do not intervene, the right acquired in a foreign jurisdiction should be enforced.[4] Thus, when in a Kentucky case the court held that the separate right of a wife to her property, as defined by the laws of Louisiana, where the parties had theretofore lived, was not lost by their removal to Kentucky, the learned judge, Marshall, who gave the opinion, said: "The laws of Louisiana cannot, it is true, be brought here to create a right, nor to regulate the mode of its exercise or assertion; and certainly not to establish a right in contravention of our laws or policy, and to the injury of our citizens. But they may be brought here to establish or prove a right existing there while the parties and the subject were wholly within the jurisdiction of that State, and it is for the laws here to determine what modifications of right have been caused by the introduction of the parties and the subject within their jurisdiction."[5]

§ 407. **General Views — Status and Property Rights compared.**

[1] McVey *v.* Holden, 15 La. An. 317; Castro *v.* Illies, 22 Texas, 479; Doss *v.* Campbell, 19 Ala. 590; Lyon *v.* Knott, 26 Missis. 458; Avery *v.* Avery, 12 Texas, 54; Valansart's Succession, 12 La. An. 848. And see Edrington *v.* Mayfield, 5 Texas, 363; Matthews *v.* Matthews, 13 La. An. 197; Polydore *v.* Prince, Ware, 402.

[2] Ante, § 402; Morales *v.* Marigny, 14 La. An. 855.

[3] Sanford *v.* Thompson, 18 Ga. 554.

[4] Groves *v.* Nutt, 13 La. An. 117.

[5] Beard *v.* Basye, 7 B. Monr. 133, 144, 145.

— In like manner, when married parties go from one jurisdiction to another, their marriage status assumes, and properly so, the peculiar hue which the law of the place where they temporarily or permanently are, gives to it. If a husband, to employ an illustration which will occur again in another chapter, marries and dwells with a wife in a locality where the law permits him to chastise her with a rod, and he thence goes with her to a place where this marital license is not allowed, he cannot use the rod upon her in the latter place. In the likeness of the rod stand before us here the rights of the wife, and of the husband, to each other's property. Yet the courts are more regardful of relations assumed under other or foreign laws as to property, than they are as to marital chastisement. It is not necessary to pursue this course of thought further; the object of this chapter being merely to impress upon the reader the truth, that there is nothing in any doctrine held by any court, on the subject of the conflict of laws as respects the property interests of married persons, militating against the views maintained in the last chapter with regard to conflicts respecting the status.

BOOK IV.

HOW MARRIAGE OR LEGITIMACY IS ESTABLISHED IN EVIDENCE.

CHAPTER XXIII.

PRELIMINARY INQUIRY AS TO THE PROOF OF FOREIGN LAWS.

§ 408. **Fact and Proof distinguished.** — Many suitors have learned to their sorrow, that there is a distinction between fact and judicial proof. Therefore this commentary on the law of Marriage and Divorce could not be complete while it contained no discussion of the evidence, and the presumptions whether of evidence or of law, whereby marriage is shown before a court of justice to exist. The question which most concerns individuals, and concerns most the courts and the profession of the law, is not whether this person and that are really married, but whether this and that piece of testimony, or this and that species of evidence, in this or that issue, legally establishes the marriage. There is many a marriage held good by reason of the sufficiency of the evidence, where the combined sufficiency of fact and law, should all the facts truly appear, would produce no such result. And, on the other hand, there are marriages, good in fact and in law, the proof whereof practically fails before a judicial tribunal. These latter are sad cases; but of the former we may say, — "If the parties have dwelt together as husband and wife, yet some kink in the law prevented their being such in fact, no tears need be shed because kink has murdered kink, and substantial justice has been done."

§ 409. **Why this Preliminary Inquiry — Scope — Doctrine that Foreign Laws must be proved.** — The preliminary inquiry indi-

cated by the title to this chapter might be omitted from these volumes, if there were any other work to which the author could refer as giving a satisfactory solution of the matter. The general doctrine, that foreign laws are to be proved as facts in our tribunals, whenever any question concerning them arises, is plainly laid down in all our English and American law books.[1] But the limits and the particular applications of this general doctrine are things upon which the books differ in some respects, and in others are indistinct. It is not the purpose of the writer, in this chapter, to thread very closely the windings of the subject as seen in the English and American books, or to cite quite all the English cases. This question belongs to a class of inquiries upon which the English judicial mind has shown itself less competent than on some others. The American decisions are here pretty fully cited, but they are not always satisfactory.

§ 410. **No Judicial Cognizance of Foreign Laws — Law of Nations.** — That a court cannot be called upon to take judicial cognizance of a local foreign law is a proposition resting in the clearest reason, and everywhere received as correct. But that courts do take cognizance of the law of nations is likewise a proposition just as plain and well established as the other. These two propositions stand, on the one hand and on the other, at the outer borders of this subject. Yet between these two outer rocks there is much of miry way, in which the judicial mind has been sometimes known to founder. Who, for instance, can take his pen and draw upon the map of this ground the line, whether it be straight or whether it be jagged, at which international and local law just meet and kiss each other, but do not blend?

§ 411. **No Proof of Foreign Law in Cause depending on it —**

[1] Story Confl. Laws, § 637; Peck *v.* Hibbard, 26 Vt. 698; Beal *v.* Smith, 14 Texas, 305; Bryant *v.* Kelton, 1 Texas, 434; Frith *v.* Sprague, 14 Mass. 455; Chonteau *v.* Pierre, 9 Misso. 3; Hite *v.* Lenhart, 7 Misso. 22; Leak *v.* Elliott, 4 Misso. 446; Tyler *v.* Trabue, 8 B. Monr. 306; Cook *v.* Wilson, Litt. Sel. Cas. 437; Baptiste *v.* De Volunbrun, 5 Har. & J. 86; Church *v.* Hubbart, 2 Cranch, 187; Ramsay *v.* McCanley, 2 Texas, 189; Owen *v.* Boyle, 15 Maine, 147; Martin *v.* Martin, 1 Sm. & M. 176; Haven *v.* Foster, 9 Pick. 112; Beauchamp *v.* Mudd, Hardin, 163; Stevens *v.* Bomar, 9 Humph. 546; Chumasero *v.* Gilbert, 24 Ill. 293; Rape *v.* Heaton, 9 Wis. 328; post, § 418.

Presumption. — Again, suppose the parties do not choose to put into their case any evidence whatever of the foreign law, — is there, in such a case, any presumption which may be resorted to respecting such law, and what presumption? In a suit upon a contract made abroad, if there is no evidence of the law which prevails where the contract was made, the court does not order a nonsuit; at least, it does not generally do this; but it suffers the suit to go on, upon some kind of presumption respecting the foreign law. As to the nature of this presumption, we have, in the reported cases, all sorts of crude notions dropped, yet we have hitherto but little which may be deemed satisfactory. Thus, to go for light first to our new State of Iowa, it was there held, that, if a controversy arises in our courts upon a contract made in another jurisdiction, the matter, *prima facie*, is deemed to be governed by the laws, statutory as well as common, prevailing in the State where the controversy arises; "for," said Wright, C. J., "as we know nothing, in the first instance, of the statutes of such foreign jurisdiction, we presume them to be the same as ours, and make ours the rule of decision."[1] And the like doctrine has been held in some of the older States; as, for instance, in South Carolina, if the writer does not misapprehend the decision, the court in laying down the doctrine observing: "In this State, playing at faro is unlawful and punished by fine; and, if we are obliged to determine that question in utter ignorance of what the law of Georgia [where the transaction took place] is, we must resolve it by our own rule, for we have no other;"[2] though, in most of the cases, the precise distinction between a mere local statute existing in the State where the

[1] Bean *v.* Briggs, 4 Iowa, 464, 468.

[2] Allen *v.* Watson, 2 Hill, S. C. 319, 322, opinion by Johnson, J. And see, as tending to the like general result, Rennick *v.* Chloe, 7 Misso. 197; Thurston *v.* Percival, 1 Pick. 415; Woodrow *v.* O'Conner, 28 Vt. 776; People *v.* Lambert, 5 Mich. 349; Rape *v.* Heaton, 9 Wis. 328; Hill *v.* Grigsby, 32 Cal. 55; Farwell *v.* Harris, 12 La. An. 50. In a Florida case, Randall, C. J. observed: "In the absence of any express allegation or proof to the contrary, it is always held that the law of another State in reference to commercial transactions is deemed to be the same in the other State as it is in the State where the court which hears the matter is sitting." Bemis *v.* McKenzie, 13 Fla. 553, 558. But here, the reader observes, the general terms of the proposition are qualified by the words "commercial transactions;" and these, in a certain sense, belong to the *jus gentium*, of which the courts (ante, § 410) take cognizance.

controversy is carried on, and the more general and broader principles of the law of such State, has not been noticed. To illustrate: it was laid down in New York, by the highest tribunal of the State, that the laws prevailing in the locality where the matter is drawn into litigation furnish the *prima facie* rule by which the decision is to be governed, in respect as well to such facts as transpired abroad, as to the other facts of the case; and Foot, J., in delivering the opinion, observed: "It is a well-settled rule, founded on reason and authority, that the *lex fori*, or, in other words, the laws of the country to whose courts a party appeals for redress, furnish, in all cases, *prima facie*, the rule of decision; and, if either party wishes the benefit of a different rule or law, as, for instance, the *lex domicilii*, *lex loci contractus*, or *lex loci rei sitæ*, he must aver and prove it. The courts of a country are presumed to be acquainted only with their own laws; those of other countries are to be averred and proved like other facts of which courts do not take judicial notice; and the mode of proving them, whether they be written or unwritten, has been long established."[1] Now, if we are to take this language in its widest sense, it carries with it the full doctrine apparently laid down in Iowa and South Carolina. But we shall see that this doctrine is certainly incorrect; or, at least, that it requires some qualification.

§ 412. **Continued.** — Thus, there is an earlier New York case, not referred to in this one, wherein a doctrine in appearance diametrically opposite to this was maintained, — it was the very point of the case, — and there is nothing in the report of the case cited in the last section intimating an intent, in the court, to overrule the earlier decision. There it was held, that, where a suit had been brought on a note executed in Jamaica, and the defendant was shown to have been under the age of twenty-one years at the time he executed it, the plaintiff could still recover upon it in the absence of any proof concerning the law of Jamaica, although, by the common law, which was the law of New York, the fact of minority being thus shown would have defeated the suit.[2] This earlier decision, however, seems

[1] Monroe *v.* Douglass, 1 Seld. 447,

[2] Thompson *v.* Ketcham, 8 Johns. 189. And see Owen *v.* Boyle, 15 Maine,

not fully accordant with some other cases than the one cited in the last section, wherein the New York tribunals have also held, that the law of New York must, as a general proposition, govern in the absence of any proof of the foreign law,[1] a proposition which is sustained likewise by adjudications and by dicta in various other States.[2] A still later New York case decides, that, if a foreign contract is claimed to be void as being usurious, the party so claiming must show the foreign law, and it is not enough that the contract would be so held if made in New York.[3] Of the like sort is the broad doctrine laid down in Illinois, that, where a contract was made abroad, it will be presumed to have been legally made, though the same contract would have been illegal if made within the jurisdiction of the forum.[4]

§ 413. **Continued.** — Partly in accord with the latter view, it has been held in Indiana, that, where the defence set up to an action was the statute of frauds, and the cause of action arose in Pennsylvania, and there was no proof of the law of Pennsylvania, the court would presume the common law to be in force there, and so the special defence was overruled.[5] There are, indeed, many cases in various States, in which the proposition that, where the matter in suit depends upon the law of one of our sister States, and there is no proof of what the law is; or, where it depends upon the construction of a statute proved to exist in such State, and there is no proof of the way in which it is construed by the courts of the State; the

147. As to our inter-State law, see contra, Holmes *v.* Mallett, 1 Morris, 82.

[1] Robinson *v.* Dauchy, 3 Barb. 20; Wright *v.* Delafield, 23 Barb. 498. And see Abell *v.* Douglass, 4 Denio, 305.

[2] Legg *v.* Legg, 8 Mass. 99; Hemphill *v.* Bank of Alabama, 6 Sm. & M. 44; Fouke *v.* Fleming, 13 Md. 392; McFarland *v.* White, 13 La. An. 394; Gautt *v.* Gantt, 12 La. An. 673; Cox *v.* Morrow, 14 Ark. 603; White *v.* Perley, 15 Maine, 470; Crosby *v.* Huston, 1 Texas, 203, which, however, compare with Ramsay *v.* McCanley, 2 Texas, 189.

[3] Cutler *v.* Wright, 22 N. Y. 472.

[4] Smith *v.* Whitaker, 23 Ill. 367. The words of Walker, J. were: "When suit is instituted on such an instrument made in a foreign country, or in a sister State, or in a territory of this government, if not repugnant to our laws, our courts will presume that the contract was made in conformity to the laws of the place of its execution, and will hold, in the absence of such a plea and proof, that the defendant admits the legality of the contract." p. 369.

[5] Johnson *v.* Chambers, 12 Ind. 102. See also Titus *v.* Scantling, 4 Blackf. 89; Trimble *v.* Trimble, 2 Ind. 76.

common law, so far as it is adapted to our institutions and situation, will be presumed to prevail there, — that is, as the writer understands it, the common law as unaffected by statutes.[1] But this presumption is often spoken of by the judges in such loose terms, or so qualified by them as applying only to the particular facts of the case in controversy before the court, that we cannot rely upon any thing concerning it as being certainly settled in any particular State. For example, in an Alabama case it was said that the common law, "in the absence of opposing proof, must be presumed to be the same in the several States of the Union; and the reasonableness of this presumption is quite apparent when it is recollected that they all derive it from a common source; and, although the several matters which the plaintiff in error offered in his defence transpired in South Carolina, and are controlled by the *lex loci*, the local law of that State will be presumed to be [not the unwritten or common law, of which the judges had just been speaking, but] similar to that of this" [State].[2] And in a Michigan case it was observed: "Under such circumstances, it being shown that the will was made out of the State, that it was found in the possession of a brother here, that it does not contravene our statute, but is duly executed under our laws, does not that, *prima facie*, entitle it to probate? In the absence of any proof we think it will be presumed, that the common law prevails where the will was made."[3]

§ 414. **That there is some Presumption — Foreign Law Books.** — The cases and points already mentioned will suffice to satisfy us that, according to universal doctrine, there is a presumption of some kind to be entertained concerning the foreign law where no proof of it appears. And it would be contrary to analogy to hold the courts to this presumption, whatever it may be, and at

[1] Shepherd *v.* Nabors, 6 Ala. 631; Elliott *v.* McClelland, 17 Ala. 206, 210; Thurston *v.* Percival, 1 Pick. 415, 417, where Parker, C. J. said, "If maintenance or champerty is *malum in se*, and an offence at common law, it is to be presumed, without any statute, that the same law is in force there;" Hinson *v.* Wall, 20 Ala. 298; Ellis *v.* White, 25 Ala. 540; Reese *v.* Harris, 27 Ala. 301; Crouch *v.* Hall, 15 Ill. 263; Holmes *v.* Mallett, 1 Morris, 82; Brown *v.* Pratt, 3 Jones Eq. 202; Crozier *v.* Bryant, 4 Bibb, 174; Hemphill *v.* Bank of Alabama, 6 Sm. & M. 44; Walker *v.* Walker, 41 Ala. 353; Blystone *v.* Burgett, 10 Ind. 28.

[2] Goodman *v.* Griffin, 3 Stew. 160, 164.

[3] High, Appellant, 2 Doug. Mich. 515, 529, opinion by Wing, J.

the same time to permit them to look for themselves into foreign books, and from those books derive the foreign law, when no proof had been introduced authenticating the books. Therefore we may doubt the correctness of a Vermont case, which holds that the court, on the trial of a cause, may proceed on its own knowledge of the laws of another State; and, when it consents to do so, the laws need not be proved; nor will the judgment be reversed, unless, in the higher court, it appears that the decision concerning the laws was wrong.[1] In fact, the entire course of judicial decision in the other States is in conflict with this Vermont doctrine.[2]

§ 415. **States deemed Foreign — Partly.** — That the States are, within the principles we are discussing in this chapter, to be deemed foreign to one another, seems to be a point sufficiently settled.[3] At the same time, would any court hold that, for instance, it could legally presume the common law to be in force in our neighboring province of Canada, or in that part of it which we historically know to be governed by the common law? In an Upper Canada case, the learned judge observed: "In regard to us, Ireland is, like all other countries out of England to which the jurisdiction of our courts does not extend, a foreign country. It is so in the same sense that Nova Scotia or Jamaica is. We do not judicially recognize its statute law. It must be proved to us what it is. All that we can assume is, that the common law of England is in force there, which we must take for granted until the contrary is proved, or unless the facts in the particular case before us warrant a presumption to the contrary. In this respect it stands on a footing different from countries wholly foreign to the British crown."[4] And to the writer it seems reasonable to hold, that, though a court cannot know what particular laws prevail in a particular country lying beyond its jurisdiction, yet it should not be deprived of the right to take such cognizance of the

[1] The State *v.* Rood, 12 Vt. 396; S. P. Middlebury College *v.* Cheney, 1 Vt. 336, 348. But see Adams *v.* Gay, 19 Vt. 358. And see Donald *v.* Hewitt, 33 Ala. 534, 550; Foster *v.* Taylor, 2 Tenn. 191.

[2] And see especially Drake *v.* Glover, 30 Ala. 382; Taylor *v.* Runyan, 9 Iowa, 522; Jones *v.* Laney, 2 Texas, 342; Newton *v.* Cocke, 5 Eng. 169.

[3] Ripple *v.* Ripple, 1 Rawle, 386; Heberd *v.* Myers, 5 Ind. 94; Allen *v.* Watson, 2 Hill, S. C. 319.

[4] Breakey *v.* Breakey, 2 U. C. Q. B. 349, 355, opinion by Robinson, C. J.

affairs of the general sovereignty under which it sits as shall indicate to the judicial understanding what particular system of law prevails over each particular space. This principle would show the reasonableness, not only of the Upper Canada view just cited, but also of those various decisions of our own tribunals recognizing the like doctrine as applied among our States.

§ 416. **How in Principle — Common Justice — Technical Rules.** — And the result to which this train of thought conducts is, that, though as between our States no judge in one State can judicially lay down, in a cause pending, the law of another State, not proved to him as a fact, he may, when he comes to give directions to a jury in a cause wherein the law of the sister State is not proved, recognize the general doctrine, that those inherent principles of right and justice which pervade the common law do, unless controlled by some technical rule peculiar to the locality, prevail in all our States; and hold the party who would resist a judgment founded upon such a presumption to the necessity of proving the technical rule. Yet there are, in the common law itself, some technical rules which operate, in the particular cases, in opposition to the general equity which runs through it: — shall a judge presume that such a technical rule exists in a sister State? On this point, the general course of our American decisions does not afford much light; yet, in reason, if the technical rule, though a rule of the common law, remains unaltered by statute in the State where the court sits, the judge may well presume it to remain unaltered in the other State. But if, in the State where the court sits, the rule has been by statute abrogated, and it is plainly a mere technicality destitute of natural equity, it would seem that the judge should not presume it to prevail in the sister State. On the other hand, to hold that some local statute of one's own State has its counterpart in a sister State would seem to be to create a presumption resting neither on justice nor on probable fact. He who would either resist or enforce a claim by reason of any thing to be found in such a statute, should prove the statute. And although the doctrines of this section are not laid down in terms in any case, yet, if we bring the

cases together, and then place them in the winepress of our reason, this seems to be the liquid they yield.

§ 417. **Foreign Laws incorporated into our own.** — The law of England, as it stood at the time of the settlement of this country, is, as we all know, a part of our own law; therefore this law is not to be proved as a fact, when we are attempting to ascertain the law of the State in which the tribunal sits. So, our courts, sitting in those States wherein at some previous time the laws of Spain, of France, or of Mexico prevailed, and where they have left their remnants or their larger proportions as an inheritance to those States, do not ask to have proved before them such foreign laws.[1] And the same rule applies where one of our States has been organized by partition from another State.[2]

§ 418. **Foreign Law to be proved — Whether to Court or Jury.** — Subject, therefore, to such limitations and modifications as are found in the foregoing sections, the rule of our law is, that he who in a court of justice presents a claim or a defence involving a question of foreign law, must both aver and prove the law.[3] But there is a difference of opinion upon the question, whether, in respect to foreign laws, as to foreign transactions taking place in parol, the proof shall be addressed to the jury, or whether it shall be given to the court, and the court instruct the jury upon it, as upon domestic law. Upon this point the late Judge Story seems, in his work on the Conflict of Laws, to have adopted the latter view: "for," he says, "all matters of law are properly referable to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury, what, in point of law, is the result of the foreign law to be applied to the matters in controversy before them. The court are, therefore, to decide what is the proper

[1] Doe *v.* Eslava, 11 Ala. 1028; Chouteau *v.* Pierre, 9 Misso. 3; Ott *v.* Soulard, 9 Misso. 573.

[2] Delano *v.* Jopling, 1 Litt. 117, 417.

[3] Peck *v.* Hibbard, 26 Vt. 698; Bean *v.* Briggs, 4 Iowa, 464; Monroe *v.* Douglass, 1 Seld. 447; Stephenson *v.* Bannister, 3 Bibb, 369; Davis *v.* Curry, 2 Bibb, 238; Church *v.* Hubbart, 2 Cranch, 187; Hempstead *v.* Reed, 6 Conn. 480; Owen *v.* Boyle, 15 Maine, 147; Martin *v.* Martin, 1 Sm. & M. 176; Leak *v.* Elliott, 4 Misso. 446; Bryant *v.* Kelton, 1 Texas, 434; Mason *v.* Wash, Breese, 16; Billingsley *v.* Dean, 11 Ind. 331; ante, § 409.

evidence of the laws of a foreign country; and, when evidence is given of those laws, the court are to judge of their applicability, when proved, to the case in hand."[1] And this view has likewise the sanction of considerable other authority.[2] A learned North Carolina judge observed: "The existence of a foreign law is a fact. The court cannot judicially know it, and therefore it must be proved; and the proof, like all other, necessarily goes to the jury. But when established, the meaning of the law, its construction and effect is the province of the court. It is a matter of professional science; and, as the terms of the law are taken to be ascertained by the jury, there is no necessity for imposing on them the burden of affixing a meaning on them, more than on our own statutes. It is the office of reason to put a construction on any given document, and therefore it naturally arranges itself among the duties of the judge. It is the opinion of this court that the court below erred in not deciding the question."[3] On the other hand, there are authorities which seem to hold, that the proof throughout is for the jury; and still others which appear to distribute the proof between them and the judge.[4] Yet all admit, that, in these cases as in others, the judge shall determine what evidence is to be submitted to the jury.[5]

§ 419. **Proof to Court or Jury, continued.** — The following considerations will show, that the view which refers the proof of the foreign law to the court and not to the jury is the true one: In every instance wherein testimony of any kind is brought to the consideration of a jury, the judge must decide, as a preliminary question, whether the testimony is admissible or not. And in every instance in which the effect of the testimony, as establishing or failing to establish a fact alleged, is agreed, the judge decides what is its legal consequence in the case. These observations are made with respect to civil causes; in criminal

[1] Story Confl. Laws, § 638.

[2] Ferguson *v.* Clifford, 37 N. H. 86; Pickard *v.* Bailey, 6 Fost. N. H. 152; Territt *v.* Woodruff, 19 Vt. 182; Middlebury College *v.* Cheney, 1 Vt. 336; Alexander *v.* Torrence, 6 Jones, N. C. 260; Wilson *v.* Carson, 12 Md. 54.

[3] The State *v.* Jackson, 2 Dev. 563, 566, Ruffin, J.

[4] Holman *v.* King, 7 Met. 384; Moore *v.* Gwynn, 5 Ire. 187; Ingraham *v.* Hart, 11 Ohio, 255; De Sobry *v.* De Laistre, 2 Har. & J. 191, 219, 229, 230; Charlotte *v.* Chouteau, 25 Misso. 465; Loring *v.* Thorndike, 5 Allen, 257.

[5] De Sobry *v.* De Laistre, supra. And see Pickard *v.* Bailey, supra.

ones, there is — according to the opinions of some persons, which opinions are controverted by others, and this is not the place to consider which class of opinion is correct — a right or duty in the jury to judge to some extent of the law;[1] but, in all cases, criminal or civil, it is matter of law, not of fact, whether a particular piece of testimony is receivable in evidence; and, when it is agreed what the testimony proves, the effect of it upon the issue is also a question of law. Therefore it must be true, that, according to every class of opinion, where there is no discrepancy in the evidence given of a foreign law, — no clashing of witness with witness, — no question as to the veracity or impartiality of a particular witness, — the court must decide what, as matter of domestic law, shall be the effect, on the issue, of the foreign law thus proved. And if a foreign statute is to be construed, the work of construing it belongs, according to every opinion which can be entertained on the subject, as much, at least, to the department of law, in distinction from the department of fact, as would be the work of construing a written instrument, which had been proved in the case; for, indeed, the statute is itself a written instrument. But where a contract, for example, lies in parol, and there is no writing, it is just as much the duty of the court to construe the contract, provided its terms are plain beyond dispute, as when it is in writing; and, by analogy, if the foreign law be a mere common or unwritten law, and its terms are proved beyond dispute, the court must decide upon its construction, and upon its applicability to the particular issue.[2] The only question remaining, therefore, is, whether the court or the jury shall pass upon the veracity, reliability, and accuracy of the witnesses who prove the foreign law, and the weight to be given to the different classes of evidence should there be a conflict therein.

§ 420. **Continued.** — Where the law is a written one, and the proof of it is by the seal of a foreign nation, there is nothing — a further point admitted — for the jury; all this is for the court. And the reason is, that, in the language of the late Professor Greenleaf: "The usual and appropriate symbols of

[1] 1 Bishop Crim. Proced. 2d ed. § 984–988.

[2] See post, § 429.

nationality and sovereignty are the national flag and seal. Every sovereign therefore recognizes, and, of course, the public tribunals and functionaries of every nation take notice of, the existence and titles of all the other sovereign powers in the civilized world, their respective flags, and their seals of state. Public acts, decrees, and judgments, exemplified under this seal, are received as true and genuine, it being the highest evidence of their character." [1]

§ 421. **Continued — (Proof of Private Statutes, &c., in the Note).** — Still the question remains, — Must not the jury pass upon the credibility of the witnesses introduced to prove the unwritten foreign law, and upon other things of a kindred nature? On this question, it is conceded by the writer, there is fair ground for differences of opinion. But the reason why the author would answer this question in the negative is, that the foreign law, although it must be proved, is still *law*, just as much as is the domestic. The court, in contemplation of the domestic law, is presumed conclusively to know this law, but not to know the foreign law; therefore the domestic law need not be proved, the foreign law must be. But the legal truth, that the judge knows the one without having it proved before him, and does not so know the other, does not change the nature of the thing; the thing, in each case, is law. It is matter of fact that a particular law is, or is not, a law prevailing in the country where the court sits; and it is the same where the alleged law is a foreign one. The existence of a law is always a thing of fact; but it is no more so where the law is foreign, than where it is domestic. Neither is it any strange principle that a judge should pass upon a fact; all judges, in all trials, are continually passing upon facts, and no trial could proceed a step unless the presiding person on the bench did this. Judges and jurors alike deal with facts; the former, with facts pertaining to the law; the latter, with facts pertaining to the question of what the parties respectively did, to bring one or the other of them within the allegations found in the record. And there are various circumstances besides those now in contemplation, in which such a question as

[1] 1 Greenl. Ev. § 4.

the credibility of a witness is for the judge and not for the jury.[1]

[1] 1. The matter discussed in this and the accompanying sections is so important that I cannot forbear adding, in a note, some considerations which the course of the argument in the text seemed not to make appropriate there. It is neither a new thing in our jurisprudence, nor a thing confined to such foreign laws as are permitted to have force in our tribunals, that there should be a law whereof the court could not take cognizance until it was pleaded by the party relying upon it, and, if denied by the other party, established also in proof. Thus, the rule is familiar, that the courts will take judicial cognizance of a public statute, yet not of a private; and that the private statute must be pleaded by the party claiming a benefit under it, and proved.

2. There is, however, no other difference than this and such other incidentals as necessarily grow out of this, between a public and a private statute; and the proof of a private statute is not addressed to the jury but to the judge. Thus, in The Prince's Case, 8 Co. 28 *a*, "it was resolved, that, against a general act of Parliament, or such an act whereof the judges *ex officio* ought to take notice, the other party cannot plead *nul tiel record;* for of such acts the judges ought to take notice: but, if it be misrecited, the party ought to demur in law upon it. And in that case the law is grounded upon great reason; for [not, the reader will notice, that the private statute is a matter pertaining to the kind of fact whereof the jury takes cognizance, instead of the judge, but] God forbid, if the record of such acts [public] should be lost, or consumed by fire or other means, that it should tend to the general prejudice of the commonwealth; but rather, although it be lost or consumed, the judges, either by the printed copy, or by the record in which it was pleaded, or by other means, may inform themselves of it."

3. Where a private statute is pleaded by a party, if the opposite party would deny the existence of the statute, his proper plea is *nul tiel record*, and the issue on this plea is not for the jury, but for the court. Spring *v.* Eve, 2 Mod. 240. It is said in Bacon's Abridgment to be a general rule, "that, if a private statute be pleaded, *nul tiel record* may be replied; but, if the exemplification of a private statute under the great seal be pleaded [a case where the pleading carries with itself the conclusive record proof], *nul tiel record* cannot be replied." Statute, L. 2. And see, on this question, Mr. Hargrave's note to Co. Lit. 98 *b*.

4. There are perhaps circumstances wherein a private statute, like many other things which ordinarily ought to be pleaded, may be given in evidence without plea; as, in like manner, there are circumstances in which a foreign law may be so given in evidence; and, in each reported case, there may be an indefiniteness in the report, and perhaps also there may have been the same in the minds of the judges and of counsel, as to whether the evidence was really addressed to the jury, or to the judge, who was to instruct the jury upon it as a question of law. In Anonymous, 2 Salk. 566, where the defendant had pleaded a private statute, and the plaintiff had replied *nul tiel record*, and the defendant had brought in the printed act to support his plea, Holt, C. J. declined to accept the evidence, and observed: "An act printed by the king's printers is always allowed good evidence of the act *to a jury;* but [in this matter for the court] was never allowed to be a record yet." I have not found any case in the books where a private statute was submitted to a jury, in distinction from the judge, in any way differing from that in which a public statute might likewise have been submitted. Possibly I may have overlooked some case, though my researches have extended much further

§ 422. **Law of Nations — Foreign Flag, Seals, &c. — Foreign Laws recognized by our Government.** — We have already seen,[1]

than to the authorities cited in this note. And wherever a private statute has been pleaded and proven, or otherwise admitted before a tribunal, the judges have dealt with it precisely as they do with a public one. For an example illustrating this proposition see Rex *v.* Shaw, 12 East, 479. And there are many other cases.

5. A custom of a mere local nature, introduced sometimes to establish a right, is a thing different from a private statute, — it is not a law, — and it is generally triable before a jury the same as are other ordinary facts. But there are, in England, customs which are for the court. 1 Bl. Com. 86.

6. Now, in strictness, no judicial tribunal ever decides any question by any foreign law; an English court cannot administer the French law, our courts cannot administer the English. But there are circumstances in which, *as applied to the particular case*, the domestic law makes the foreign law its own. Such a case is analogous to one which is governed by a private statute. Though the foreign law may not be burned like a parliament roll; and the reason why, in these exceptional cases where the rights of limited numbers of individuals only are concerned, the courts should not be required to take judicial notice of the foreign law, may not be, in form, the same which controls the like matter as regards private statutes; yet, in substance, the two cases stand on the same ground. It would be unreasonable to require the judges to carry in their minds laws which pertain only to some particular individuals, not to the community at large; besides, if this were demanded, they would be so burdened with what may be termed the care of particular and exceptional persons, that they could not attend well to the legal interests of the public at large. But these considerations do not show, that the law for the exceptional cases is not as truly law as is the law for the mass of cases; or that the jury, who are not to judge of the law for the mass, are therefore to be the judges of the law for the few.

7. That in respect especially to matrimonial law, if, for instance, a marriage which was celebrated abroad, is held good with us, because it was good there, — that, I say, in these circumstances, the matter is really decided by our own law, and not by the foreign, has been already shown in these pages. Ante, § 367. Let me here add a transcript of the words of Sir Edward Simpson on this very point: "It is the law of this country," he said, "to take notice of the laws of France, or any foreign country, in determining upon marriages of this kind; the question being in substance this, whether, by the law of this country, marriage contracts are not to be deemed good or bad, according to the laws of the country in which they are formed, and whether they are not to be construed by that law. If such be the law of this country, the rights of English subjects cannot be said to be determined by the laws of France, but by those of their own country, *which sanction and adopt this rule of decision.*" Scrimshire *v.* Scrimshire, 2 Hag. Con. 395, 407, 4 Eng. Ec. 562, 568.

8. Thus, as I have said, the domestic law makes the foreign law its own for the particular case. But though the domestic is public law, it does not make the foreign law public also, to be judicially recognized by the courts. In the case of a private statute, if a public statute recognize it, then the private statute becomes public law, to be judicially noticed by the courts. Benson *v.* Welby, 2 Saund. Wms. ed. 154, 155, note; Samuel *v.* Evans, 2 T. R. 569, 575; Dwar. Stat. 2d ed. 465. For, in the one instance, the reason

[1] Ante, § 410, 420.

that the law of nations is not, in any tribunal, foreign law; and that so much of the domestic law of a foreign country as determines its flag and its seal is likewise, like the international law, domestic in every court of justice.[1] In like manner, "where," says Story, "our own government has promulgated any foreign law or ordinance, of a public nature, as authentic, that may of itself be sufficient evidence of the actual existence and terms of such law or ordinance;"[2] for this renders it, so far as the evidence is concerned, domestic law. Likewise it has been held, in the Supreme Court of the United States, that a copy of the Civil Code of France, purporting to be printed at the royal press in Paris, and *received in the course of our international exchanges*, with the indorsement "*Les Gardes des Sceaux de France à la Cour Suprême des États Unis*," may be received by the court, as evidence of the French law, without further proof. "Congress," said Wayne, J., "has acknowledged it by the act [authorizing the exchange], and the appropriation which was given to the Supreme Court to reciprocate the donation. We transmitted to the minister of justice official copies of all the laws, resolutions, and treaties of the United States, and a complete series of the decisions of this court. We do not doubt, whenever the question shall occur in the courts of France, that the volumes which were

still holds good, that our judges could not, without being overburdened, carry in their minds an adequate knowledge of all foreign law; while, in the other, where a private statute is recognized by a public one, the attention of the judges is thereby, in the terms of the law, directed to the private act, and to hold them to a knowledge of it imposes on them no additional burden.

9. There are some persons who would commit all questions, both of law and fact, to the decision of the jury; and even permit the jury to determine, whether each particular piece of evidence should be received as admissible, or rejected. This course may be a good one, or it may not; at all events, it is not the course established by our judicial precedents. But surely if there is any question which the judge instead of the jury should decide, it is a question of foreign law, — more difficult, from being less understood, than are questions of domestic law; and requiring for its solution, even more than these, the peculiar knowledge possessed by the judge, in distinction from the knowledge possessed by the jury. See also, post, § 423.

[1] Marshall, C. J. lays down the general doctrine respecting this matter of foreign laws in the following words: "The laws of a foreign nation, *designed only for the direction of its own affairs*, are not to be noticed by the courts of other countries, unless proved as facts." Talbot *v.* Seeman, 1 Cranch, 1, 38. And Johnson, J. uses the like language in a South Carolina case. Allen *v.* Watson, 2 Hill, S. C. 319, 320.

[2] Story Confl. § 640; Talbot *v.* Seeman, 1 Cranch, 1.

sent by us will be considered sufficiently authenticated to be used as evidence." [1]

§ 423. **United States Judges take Cognizance of State Laws — House of Lords recognize English Law in Scotch Appeals.** — The Supreme Court of the United States, and the several United States circuit courts, take judicial cognizance of the laws of the individual States, and they need not therefore be proved to them as facts. At the same time, the States are separate and independent sovereignties; but the reason for the doctrine seems to be, that, as the United States tribunals administer in particular cases some parts or even the whole of the laws of the States, — as for example, where a jurisdiction is given them by reason of the plaintiff and defendant being citizens of different States, — they must take cognizance of these local laws, the same as though they were laws of the United States.[2] And a point somewhat curious and similar to this, arose in the British House of Lords, sitting as a court of appeal from Scotland. In the Scotch court below, there had been proof given by experts of the English law; and, upon the testimony, the case was decided in a particular way. When it came before the House of Lords, the decision was reversed, the lords not agreeing with the experts in their interpretation of the law of England. "In the Scotch courts," said the Lord Chancellor, "English law is a matter of evidence, and the evidence of what it is must be sent there from England. The opinions of English lawyers upon English law become, therefore, in Scotch courts, matters of fact, and are so received; but how stands the case here in the court of appeal, where the judges are at once judges of English and of Scotch law? Is it not somewhat of a subtlety to say, that, though I am an English lawyer, I sit here on Scotch appeals as a Scotch lawyer only, and that I have therefore only a right to look to the report of the English law made by an English lawyer as a matter of fact, in the same manner as if I were a Scotch judge sitting in a Scotch court, and bound so to receive it." [3] And if this view is correct, it lends strong corroboration to the propo-

[1] Ennis *v.* Smith, 14 How. U. S. 400, 429.

[2] Owings *v.* Hull, 9 Pet. 607, 625, where the reason is stated by Story, J., in a somewhat different form of words.

[3] Douglas *v.* Brown, 2 Dow & C. 171, 177.

sition stated a few sections back,[1] that the law of a foreign country is matter to be dealt with by the court and not by the jury; because the House of Lords sits as a court of appeal only in respect of the law as adjudicated below, and not of facts as found by juries.

§ 424. **How prove Written Law of Sister State.** — Some of our State courts have held, that the written law of sister States may be proved by the mere presentation to the court of an apparently official copy of the statutes of such States,[2] — a mode of proof never allowed in the case of laws strictly of a foreign country;[3] but perhaps, most of the State tribunals discard this kind of evidence, and in the absence of any legislative direction require, that either such statutes be authenticated in the way pointed out by the act of Congress,[4] or be verified by the oath of some person, or otherwise made to appear to be correct by some evidence equivalent to an oath or such verification.[5] But this matter is now, in most of the States, regulated by statutes; as, for example, in Missouri it is enacted, that "the printed statute-books of sister States and the several Territories of the United States, purporting to be printed under the authorities of such States or Territories, shall be evidence of the legislative acts of such States or Territories;" and, to make a volume evidence under this provision, it must purport to be printed under the authority of the State whose statutes it purports to contain.[6] A book of statutes

[1] Ante, § 421.

[2] Mullen *v.* Morris, 2 Barr, 85; Hanrick *v.* Andrews, 9 Port. 9; Taylor *v.* Bank of Illinois, 7 T. B. Monr. 576; Raynham *v.* Canton, 3 Pick. 293; Emery *v.* Berry, 8 Fost. N. H. 473; Thomas *v.* Davis, 7 B. Monr. 227, 230; Barkman *v.* Hopkins, 6 Eng. 157; Foster *v.* Taylor, 2 Tenn. 191; Cox *v.* Robinson, 2 Stew. & P. 91; Thompson *v.* Musser, 1 Dall. 458; The State *v.* Abbey, 29 Vt. 60.

[3] Raynham *v.* Canton, supra; Packard *v.* Hill, 2 Wend. 411; Chanoine *v.* Fowler, 3 Wend. 173; Lincoln *v.* Battelle, 6 Wend. 475; Beach *v.* Workman, 20 N. H. 379.

[4] As to authentication under the act of Congress, see Sisk *v.* Woodruff, 15 Ill. 15; The State *v.* Carr, 5 N. H. 367; United States *v.* Johns, 1 Wash. C. C. 361; Henthorn *v.* Shepherd, 1 Blackf. 157; Wilson *v.* Walker, 3 Stew. 211; The State *v.* Cheek, 13 Ire. 114; Warner *v.* Commonwealth, 2 Va. Cas. 95; Hunter *v.* Fulcher, 5 Rand. 126; Wilson *v.* Lazier, 11 Grat. 477; The State *v.* Jackson, 2 Dev. 563.

[5] Adams *v.* Gay, 19 Vt. 358; The State *v.* Twitty, 2 Hawks, 441; Comparet *v.* Jernegan, 5 Blackf. 375; Stanford *v.* Pruet, 27 Ga. 243; Bailey *v.* McDowell, 2 Harring. Del. 34; Craig *v.* Brown, Pet. C. C. 352.

[6] Bright *v.* White, 8 Misso. 421, 425; s. p. Baughan *v.* Graham, 1 How. Missis. 220; Magee *v.* Sanderson, 10 Ind. 261; Yarbrough *v.* Arnold, 20 Ark.

purporting merely to be printed by a private printer is not generally admitted in evidence.[1] The words of the Massachusetts provision are: "Printed copies of the statute laws of any other State, and of the United States, or of the Territories thereof, if purporting to be published under the authority of the respective governments, or if commonly admitted and used as evidence in their courts, shall be admitted in all courts of law, and on all other occasions, in this State, as *prima facie* evidence of such laws."[2] And it was held, that this provision covered the case of a pamphlet containing the acts of a single session only.[3] If the volume produced has the words "By Authority" printed on it, this sufficiently shows that it proceeded from the government whose laws it purports to contain.[4]

§ 425. **How much of the Law — Date — Presumption of its Continuing.** — Where the written law of a foreign state is to be proved, it is not necessary to present to the tribunal the whole body of the statutes; but an authenticated copy of the particular section or act relied on is to be received as *prima facie* sufficient.[5] In like manner, if the law, whether written or unwritten, is proved as of a particular date, the presumption appears to be, that it is the same at all subsequent times; leaving the burden with the other party to show, if he can, a change to have afterward taken place.[6] And on this principle it was held in one of our former slaveholding States, that the existence of slavery might be presumed in a sister State, as follows: "Slavery, it is believed," said the learned judge, "was originally introduced into the colonies by a regulation of the mother country, of which the courts in all the colonies

592. As to Iowa, see Latterett *v.* Cook, 1 Iowa, 1.

[1] Canfield *v.* Squire, 2 Root, 300; Bostwick *v.* Bogardus, 2 Root, 250; Dixon *v.* Thatcher, 14 Ark. 141; Kinney *v.* Hosea, 3 Harring. Del. 77; Geron *v.* Felder, 15 Ala. 304. See Allen *v.* Watson, 2 Hill, S. C. 319; Ellis *v.* Wiley, 17 Texas, 134.

[2] Gen. Stats. c. 131, § 63. The Rev. Stats. c. 94, § 59, were in like terms.

[3] Ashley *v.* Root, 4 Allen, 504.

[4] Merrifield *v.* Robbins, 8 Gray, 150. S. P. Crake *v.* Crake, 18 Ind. 156.

[5] Hunter *v.* Fulcher, 5 Rand. 126; Grant's Succession, 14 La. An. 795.

[6] The State *v.* Patterson, 2 Ire. 346. In a Massachusetts case, Parker, C. J., observed of a statute of another State which had been produced in evidence: "The law being proved to have existed, in the manner above stated, it must be presumed to exist until proved by as good evidence to have been repealed." Raynham *v.* Canton, 3 Pick. 293, 297.

were equally bound to take notice, in the same manner as the courts of the several States are now bound to take notice of any regulation of the general government of the United States; and what the courts of the colonies were then bound to take notice of judicially, we must still be presumed to know, if not as matter of law, at least as matter of history. . . . . As, therefore, in the State of Delaware we must presume that the law tolerates slavery, inasmuch as that was the case before the Revolution, the presumption of slavery which attaches to the plaintiff is not destroyed by proof of his removal from that State."[1] In this case, the presumption drawn by the court harmonized with the law of the State in which it was drawn; but plainly the like presumption would not be made in any free State, because, among other reasons, it would not harmonize with the law of such free State. And there must be various qualifications to the general proposition, that, when the foreign law has been proved as of a particular date, it shall be presumed to be the same during subsequent periods of time. Still, the general doctrine holds good; and, in some circumstances, the presumption may be even made to run the other way, so that the court will deem the anterior law to be the same with the law proved as of a later date.[2]

§ 426. **Witnesses — Record Evidence.** — The general question, who may be witnesses to prove the foreign law, where it is not made to appear as a record under the seal of the foreign nation, or is not presented in the form of the authentic statute-book of a sister State, will be best considered when we come specially to treat of the evidence to establish a foreign marriage. But it may here be observed, in connection with the subject of record, that a United States consul abroad is not authorized so to certify the laws of the country in which his consulate is, as to make the certificate evidence, without other proofs, in our courts.[3] Says Story: "The usual mode of authenticating foreign laws (as it is of authenticating foreign judgments) is by an exemplification of a copy under the great

[1] Davis *v.* Curry, 2 Bibb, 238, 240, 241, opinion by Boyle, C. J. For a case somewhat similar in principle, see Charlotte *v.* Chouteau, 25 Misso. 465. And see Farwell *v.* Harris, 12 La. An. 50.

[2] Goodwin *v.* Appleton, 22 Maine, 453.

[3] Stein *v.* Bowman, 13 Pet. 209.

seal of a State, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by the certificate of an officer properly authorized by law to give the copy, which certificate must itself also be duly authenticated."[1] The original evidence of a statute, in any State, is the engrossed act itself to be found in the office of the Secretary of State; and, though there may be error in the printed copy commonly used by the courts in such State, yet the error will be rectified on the production of this original testimony.[2] And if a witness is to give evidence of a foreign written law, plainly the rule thus mentioned by Story requires, not that he should present a copy which he has made from what he knows to be the usually received published statutes of such country, but from the original rolls. On other principles, a witness would be precluded from testifying, in parol, to the contents of a written foreign statute-book, or otherwise stating what is the written foreign law, without the production of the law itself; and that he cannot do this, is a point well settled.[3] Likewise it has been held, that mere parol proof of the fact of a book, which is presented to the court, being commonly received and used in the courts of the foreign state as an authentic copy of the statutes of such state, is no sufficient evidence of the existence of the statutes it purports to contain.[4] On the other hand, in Pennsylvania, the court admitted the printed statutes of Ireland, accompanied by the affidavit of an Irish barrister that he received them from the king's printer, and that they are evidence in Ireland, to be read in evidence as showing the Irish statutory law.[5] In like manner the tribunal of Maine has held, that a printed volume of the laws of a British province, proved by witnesses to have received the sanction of the executive and judicial officers of the province

[1] Story Confl. Laws, § 641; s. p. Wayne, J., in Ennis *v.* Smith, 14 How. U. S. 400, 426.

[2] Clare *v.* The State, 5 Iowa, 509.

[3] Kenny *v.* Clarkson, 1 Johns. 385; Robinson *v.* Clifford, 2 Wash. C. C. 1; Hoes *v.* Van Alstyne, 20 Ill. 201; Emery *v.* Berry, 8 Fost. N. H. 473; Comparet *v.* Jernegan, 5 Blackf. 375; Smith *v.* Potter, 27 Vt. 304; United States *v.* Ortega, 4 Wash. C. C. 531; Tryon *v.* Rankin, 9 Texas, 595; McNeill *v.* Arnold, 17 Ark. 154; Consequa *v.* Willings, Pet. C. C. 225; Woodbridge *v.* Austin, 2 Tyler, 364; Charlotte *v.* Chouteau, 25 Misso. 465.

[4] Van Buskirk *v.* Mulock, 3 Harrison, 184.

[5] Jones *v.* Maffet, 5 S. & R. 523.

as containing its laws, and to be commonly cited in its courts, is admissible in evidence in a case where the title to land situated within such province is in question.[1] And in Texas[2] and Vermont[3] the full doctrine seems to be laid down, that, where the witness knows the statute-law produced to be the same which is commonly read and received in the courts of the foreign country as authentic, it may be so read in the tribunals of the country wherein the matter is drawn into controversy.

§ 427. **Proof of the Unwritten Law — Construction.** — The proof of the common, or unwritten, law of a foreign country may, and indeed must, be by parol.[4] And the construction which a statute is to receive, together with its application to the particular case in hand, is a matter pertaining to the foreign unwritten law. These, therefore, may be proved likewise by parol.[5] But suppose the party who relies upon the foreign law, whether written or unwritten, does not introduce any evidence concerning its construction or its applicability to the particular case, — does he, therefore, stand as though he had not introduced the law, so that his production thereof amounts to a mere nullity? There are no cases which so hold. On the other hand, it is by respectable judges decided, that in such circumstances the court before which the trial is being conducted will construe for the jury, and apply to the case, the foreign law the same as if it were domestic.[6] In such a case, either the evidence of the foreign law must pass for nothing, or else the law must be construed by the court, or by the jury.[7]

[1] Owen *v.* Boyle, 15 Maine, 147.

[2] Burton *v.* Anderson, 1 Texas, 93.

[3] Spaulding *v.* Vincent, 24 Vt. 501.

[4] McRae *v.* Mattoon, 13 Pick. 53; Frith *v.* Sprague, 14 Mass. 455; United States *v.* Ortega, 4 Wash. C. C. 531; Livingston *v.* Maryland Insurance Co., 6 Cranch, 274; Dougherty *v.* Snyder, 15 S. & R. 84; Kenny *v.* Clarkson, 1 Johns. 385; Robinson *v.* Clifford, 2 Wash. C. C. 1; Danforth *v.* Reynolds, 1 Vt. 259; Tryon *v.* Rankin, 9 Texas, 595; Wilson *v.* Carson, 12 Md. 54; McNeill *v.* Arnold, 17 Ark. 154; Merritt *v.* Merritt, 20 Ill. 65; Tyler *v.* Trabue, 8 B. Monr. 306; Consequa *v.* Willings, Pet. C. C. 225; Woodbridge *v.* Austin, 2 Tyler, 364; Charlotte *v.* Chouteau, 25 Misso. 465.

[5] Hoes *v.* Van Alstyne, 20 Ill. 201; Dyer *v.* Smith, 12 Con. 384; People *v* Lambert, 5 Mich. 349; Walker *v.* Forbes, 31 Ala. 9.

[6] Sidwell *v.* Evans, 1 Pa. 383; Charlotte *v.* Chouteau, 25 Misso. 465. This doctrine seems to be fairly deducible also from Ennis *v.* Smith, 14 How. U. S. 400, 428. See also post, § 430.

[7] In Holman *v.* King, 7 Met. 384, the work of construction seems to have been left, on the evidence, for the jury.

That on no sound principles can it be made matter for the jury, has been already shown in these pages.[1]

§ 428. **Proof of Foreign Written Law, continued.** — From the third edition of Taylor on Evidence, the following passage, with the notes attached, has been extracted: "It seems to have been thought at one time, that all foreign *written* law must be proved by a copy properly authenticated;[2] but this doctrine is now distinctly exploded; the House of Lords having determined,[3] in accordance with a decision of the Court of Queen's Bench,[4] that, whenever foreign written law is to be proved, that proof cannot be taken from the book of the law, but must be derived from some skilled witness who describes the law."[5] And in the case before the House of Lords to which the author refers, Lord Brougham observed: "It is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it. If the Code Napoleon was before a French court, that court would know how to deal with and construe its provisions; but in England we have no such knowledge, and the English judges must therefore have the assistance of foreign lawyers." And Lord Denman added: "A skilful and scientific man must state what the law is, but may refer to books and statutes to assist him in doing so."[6]

§ 429. **Continued.** — In the case of Ennis *v.* Smith, before the Supreme Court of the United States, Mr. Justice Wayne shows, that the doctrine stated in the last section cannot be, in an unqualified sense, sound, even as an exposition of the present English law. And he quotes Lord Langdale, "who also sat with the other judges in the Sussex Peerage Case," as using afterward[7] the following language: "Though a knowledge of

[1] Ante, § 418–421 and note.

[2] Rex *v.* Picton, 30 How. St. Tr. 491, per Lord Ellenborough; Clegg *v.* Leory, 3 Camp. 166; Millar *v.* Heinrick, 4 Camp. 155; Freemoult *v.* Dedire, 1 P. Wms. 429; Boethlinck *v.* Schneider, 3 Esp. 58.

[3] Sussex Peerage Case, 11 Cl. & F. 85, 114–117.

[4] Baron de Bode's Case, 8 Q. B. 208, 250–267.

[5] 2 Taylor Ev. 3d ed. § 1280.

[6] Sussex Peerage Case, 11 Cl. & F. 85, 115, 116.

[7] In Nelson *v.* Bridport, 8 Beav. 527, 537.

foreign law is not to be imputed to the judge, you may impute to him such a knowledge of the general art of reasoning as will enable him, with the assistance of the bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness was required, in every case, justice might often have to stand still; and I am not disposed to say, that there may not be cases in which the judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially if there should be a variance or want of clearness in the testimony." At all events, the doctrine of the last section, however it may stand in England, is not, as concerns the present point, law in the United States.[1] It would prove extremely embarrassing in administration, and reverse the whole course of our inter-State practice and adjudication on this subject. The doctrine of an Ohio case is believed to be sound in our American jurisprudence generally, that the statutes of a sister State, and the interpretations which they have received from the courts of the State, must be proved as facts; "and," it was added, "if such statutes be given in evidence, but no evidence of such peculiar construction be given, the courts of the State will give the statutes such construction as may be authorized by the settled construction of such statutes in this State."[2]

§ 430. **Foreign Judicial Decisions.** — In Connecticut it is provided by statute, "That the reports of the judicial decisions of other States and countries may be judicially noticed by the courts of this State, as evidence of the common law of such States or countries, and of the judicial construction of the statutes or other laws thereof."[3] And there are cases reported in other States, in which something approaching to this has been done without statutory authority.[4]

§ 431. **Conclusion — Needed Rule of Court.** — Thus we have brought under our review the leading doctrines, with most of

[1] Ennis *v.* Smith, 14 How. U. S. 400, 428.

[2] Smith *v.* Bartram, 11 Ohio State, 690.

[3] Lockwood *v.* Crawford, 18 Conn. 361.

[4] Ferguson *v.* Clifford, 37 N. H. 86; Donald *v.* Hewitt, 33 Ala. 534, 550; Alexander *v.* Alexander, 31 Ala. 241; Alexander *v.* Torrence, 6 Jones, N. C. 260, 262.

the American cases, and some of the English, connected with the subject of the present chapter. It is believed, that, without further expansion of the matter, the reader can gather from it what are the author's views; and, a point of vastly greater importance, what are the materials, both of decision and of reason, out of which to form views for himself. In a country like our own, the facilities for proving the laws of neighboring States and nations should be as much extended as is consistent with the high rule which protects parties from imposition. And if the judges of our courts should, among their Rules of Court, adopt on this subject a provision permitting parties, on notice to the opposite party, to introduce, if not objected to, the books of the public laws of other countries specified in the notice, and requiring the other party, if he objects, to verify his objection by an oath, and a statement showing that he should probably be prejudiced by such a course, they would promote substantial justice, and save expense and labor to litigants.

CHAPTER XXIV.

THE PRESUMPTIONS WHICH ATTEND THE OTHER PROOFS OF MARRIAGE.

§ 432. **Presumptions operating with other Proofs.** — There were readers who gave reluctantly, if at all, their assent to the proposition laid down in the last chapter, that, when the law of a foreign country is to be established in a judicial tribunal as a fact connected with a cause in hearing before the jury, the questions of the existence, the interpretation, and the application to the cause of the foreign law, and even such attendant questions as the credibility of the witnesses to prove it, are for the judge

and not for the jury.[1] If to such persons it seemed strange that the judge should pass upon a fact, which was also law, thus leaving it to the court rather than to the jury to determine how the cause, upon this fact, should be decided, — how can they reconcile themselves to this other truth, that, in all cases in which the issue is one of marriage or no marriage, the judge, according to established doctrine about which there is no dispute, is to submit to the jury this issue, not as a bare one without any controlling presumptions, but upon certain pre-established presumptions of law, the result of which must ordinarily be to leave to the jury but little of discretion concerning their verdict? It is not the purpose of the writer of these volumes to vindicate the law, so much as to state what it is; yet the reader cannot fail to notice, that, in respect to a thing of such universal concern as marriage, there is wisdom in giving to the procedure by which the question is established, so much uniformity and certainty as shall leave no doubt, in most instances, as to what the result of a litigation would be. And this can only be done through established and known rules of law. Likewise, as in each case the practical question is, not whether a marriage has been truly entered into or not, but whether, upon the proofs and the presumptions, a jury would find in favor of or against the assumed marriage, this subject of the evidence of marriage is, in effect, but another branch of the jurisprudence discussed in the last Book, wherein the writer undertook to explain by what means marriages are formed, and what imperfections in their formation render them null or voidable.

§ 433. **The Particular Presumptions — How the Chapter divided.** — In this chapter, the following four presumptions will be considered: I. The Presumption of Innocence; II. The Presumption that Official Persons have done their Duty; III. The Presumption of Life; IV. The General Presumption which favors Marriage. The third of these presumptions is sometimes brought forward to defeat a marriage; as, where a man is shown to have had a former wife living shortly before he contracted a second marriage, and the presumption of life is called in to show, that, at the time of the solemnization of the

[1] Ante, § 421 and note, and accompanying sections.

second marriage, he was already a married man. The three other presumptions have for their object the strengthening of marriage. Yet none of these three are peculiar to this issue, except the last; the other two being equally available in other issues. And there is one observation which the reader should bear specially in mind; namely, that though no single one of these three presumptions may be sufficient to establish a particular marriage in controversy, yet, in combination, the three may suffice. Between the single strand and the threefold cord there is, indeed, often this difference, that, while the strand can be broken, the cord cannot be. Yet it is necessary to look at this cord strand by strand.

I. *The Presumption of Innocence.*

§ 434. **General Doctrine.** — Mr. Best, whose words we shall here quote in connection with his text, says: "It is a principle of law, nearly if not quite universal, that *Odiosa et inhonesta non sunt in lege præsumenda.*[1] In furtherance of this it is a maxim, that fraud and covin are never presumed,[2] even in third parties whose conduct only comes in question collaterally.[3] So the law in general presumes against vice and immorality; and on this ground holds acknowledgment, cohabitation, and reputation presumptive evidence of marriage;[4] except"[5] in cases to be particularly mentioned further on. Of the like sort to this is the language of the books generally. It is not so clear — is not a block of truth cut so neatly from the quarry — as we should like to see. When the adjudged cases and the disquisitions of the judges on the bench are brought also before our contemplation, we derive from the whole what is believed to be a better statement of so much of the doctrine as concerns our present inquiries, thus, — that, since no man is to be presumed, without proof, to live in violation of law and of the ordinary rules of decency and decorum, the law shall presume every couple who live together in the way of husband and wife to be such in fact. This presumption is not a conclusive one, but it

[1] 10 Co. 56 *a*.

[2] 10 Co. 56 *a*; Cro. Eliz. 292; Cro. Jac. 451; Cro. Car. 550.

[3] Per Buller, J., in Ross *v.* Hunter, 4 T. R. 38.

[4] Fleming *v.* Fleming, 4 Bing. 266; Reed *v.* Passer, Peake, 231.

[5] Best Ev. 2d Lond. ed. 416.

permits the party who would dispute the result in the particular instance to establish such his allegation in proof. In other words, the presumption merely casts upon him who claims that the parties are not married, the burden of proving them not to be married.

§ 435. **Universality of the Presumption.** — The presumption of innocence is one which runs through the entire field of our law. Not only is a man who is indicted for a crime presumed to be innocent, notwithstanding the indictment, but for a stronger reason is the man who is not even indicted so presumed. Innocence is the usual condition of mankind before the law; and, where the contrary is alleged in an individual case, it must be specially shown. This general doctrine is, in the books, expressed in an almost infinite variety of forms. Thus, in one case, Lord Ellenborough, C. J., laid it down as follows: It is a general rule of law, he said, "that, where any act is required to be done, on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burden of proving the contrary, that is, in such case of proving a negative, on the other side,"[1] — a statement which shows the identity of the doctrine discussed in the present and in the next sub-title. The division of the matter thus was adopted by the writer merely for the sake of convenience. That persons shall not be deemed without proof to be guilty of immoralities, though they do not amount to crimes, is likewise a branch of this same presumption.

§ 436. **Not conclusive — Burden of Proof.** — Presumptions of this class are not, as already noticed, conclusive; still it is generally said that they shift the burden of proof.[2] Perhaps this expression is inaccurate, and it would be more nicely exact to say, that, viewed as a species of evidence, they establish a *prima facie* case; but, however this may be, when a marriage is made to appear by the force of this sort of presumption, the other party may show, that, in truth, there was no marriage; and so the presumption fails.[3]

[1] Williams *v.* East India Co., 3 East, 192, 199.

[2] 1 Greenl. Ev. § 33–35.

[3] Philbrick *v.* Spangler, 15 La. An. 46; Myatt *v.* Myatt, 44 Ill. 473; Guardians of the Poor *v.* Nathans, 2 Brew-

§ 437. **How Doctrine applied — Cohabitation — Reputation.** — The result of these propositions is, that, as already stated, when a man and woman are living together in the way of husband and wife, and there is no counter-evidence or counter-presumption in the case, they are in law taken to be married persons,[1] — a conclusion which may indeed be resisted by other evidence, or by other matter which appears in the case itself. "Like all other contracts," remarks Bullard, J., in a Louisiana case, marriage "may be proved by any species of evidence, not prohibited by law, which does not presuppose a higher species of evidence within the power of the party; and cohabitation as man and wife furnishes presumptive evidence of a preceding marriage. It is not to be presumed those who hold themselves out in society as man and wife, who are rearing a family of children at their domestic board, to whom the father gives his name, over whom he exercises a parent's authority, and administers a parent's protection and support, are living in open disregard of public morals, and that their common offspring are bastards."[2]

§ 438. **Continued.** — Cohabitation, and the reputation of being husband and wife, are usually considered together in questions concerning the proof of marriage; the one being, in a certain sense, the shadow of the other. Some of the authorities favor the idea, that reputation of itself may be received as sufficient proof *prima facie*,[3] but it must be uniform and general; and, if there is a conflict in the repute, it will not establish the marriage.[4] On the other hand, its sufficiency in

ster, 149; Physick's Estate, 2 Brewster, 179.

[1] Starr *v.* Peck, 1 Hill, N. Y. 270; Telts *v.* Foster, 1 Taylor, 121; Shand *v.* Gardiner, 2 Lee, 135, 6 Eng. Ec. 68; Eaton *v.* Bright, 2 Lee, 85, 161, 6 Eng. Ec. 47, 80; Cunninghams *v.* Cunninghams, 2 Dow, 482; Rex *v.* Twyning, 2 B. & Ald. 386; Fleming *v.* Fleming, 4 Bing. 266, 12 J. B. Moore, 500; Hubback on Succession, 248; Hantz *v.* Sealy, 6 Binn. 405; Budington *v.* Munson, 33 Conn. 481; Lehigh Valley Railroad *v.* Hall, 11 Smith, Pa. 361; Christie's Estate, 1 Tucker, 81; Guardians of the Poor *v.* Nathans, 2 Brewster, 149. The length of time during which the cohabitation continued is a material circumstance in considering its weight in proof of marriage. Revel *v.* Fox, 2 Ves. Sen. 269; Hervey *v.* Hervey, 2 W. Bl. 877.

[2] Holmes *v.* Holmes, 6 La. 463.

[3] Fleming *v.* Fleming, 4 Bing. 266, 12 J. B. Moore, 500; Fornshill *v.* Murray, 1 Bland, 479, 482; Pettingill *v.* McGregor, 12 N. H. 179; Mitchell *v.* Mitchell, 11 Vt. 134; Sneed *v.* Ewing, 1 J. J. Mar. 460, 491; Tarpley *v.* Poage, 2 Texas, 139, 149; Hubback on Succession, 243; Jones *v.* Hunter, 2 La. An. 254.

[4] Cunninghams *v.* Cunninghams, 2

any case has been denied, unless there be accompanying proof of cohabitation.[1] We shall find further light on this point as we proceed in this discussion.[2] By the Scotch law cohabitation alone is considered insufficient; there must also be "habit and repute;" because, it is said, the parties may eat and live and sleep together, as mistress and keeper, without any intention of entering into marriage. Nor is evidence of habit and repute alone sufficient; it must be coupled with evidence showing the cohabitation to be matrimonial.[3] It may be observed, that, in Scotland, matrimonial cohabitation with habit and repute seems almost to be regarded as something more than mere evidence of marriage; the books of Scotch law, unlike ours, laying down the proposition that marriage may be *constituted* by such cohabitation, habit, and repute,[4] though undoubtedly in a just and philosophical view these are there, as here, but the *evidence* of marriage.[5] Indeed, we have seen that the doctrine is so held.[6] In our law, the cohabitation must be matrimonial, in distinction from a connection professedly illicit;[7] nor can we easily see how it can be separated from the reputation of marriage, as a question of fact, however it may be as one of law.

§ 439. **Continued.** — It is almost impossible so to separate the elements which compose the different cases as to enable us to state, on the authorities, precisely what weight is to be given the presumption of innocence; what, or whether any, to its shadow, reputation; and so on, of the rest. In all the cases there are facts more or less operating with or against this great central presumption of the innocence of a cohabitation. Chancellor Walworth observed: "If a man and woman are cohabiting together, and the question to be decided is, whether the character of her intercourse with him is matrimonial or meretricious, the *declarations* of the parties during the existence of such intercourse, the fact of their *appearing in public*

Dow, 482; 1 Fras. Dom. Rel. 207; Jones *v.* Hunter, supra; Hamilton *v.* Hamilton, 1 Bell Ap. Cas. 736, 9 Cl. & F. 327.

[1] 1 Greenl. on Evidence, § 107. And see 1 Phillips on Ev. with C. & H.'s notes, 3d ed. 234, 428.

[2] See post, § 540.

[3] 1 Fras. Dom. Rel. 204, 205.

[4] Ib. 202.

[5] Ante, § 246, 266.

[6] Ante, § 266, 266 *a*.

[7] Matter of Taylor, 9 Paige, 611; Rose *v.* Clark, 8 Paige, 574.

with each other as husband and wife, of their visiting in respectable families, and of their being *treated by their acquaintances* and spoken of by them as sustaining that relation to each other, constitute a part of the *res gestæ*, showing the character of that intercourse to be matrimonial and virtuous. And contemporaneous declarations and attending circumstances of a different character would be legal evidence from which the conclusion might be legitimately drawn, that the intercourse between the parties was illicit and dishonorable." [1] But declarations of the parties and other attendant circumstances, in order to be received in evidence on the principle here stated, must be contemporaneous with the cohabitation, which is the main fact, and the fact to which they are intended to give character. Therefore declarations made, and general reputation originating, after the cohabitation had ceased, were held in one case not to be receivable.[2]

§ 440. **How the Doctrine is limited. — Inference nullifying Inference.** — The reason of the rule that cohabitation, with its attendant shadow the reputation of marriage, is to be received as sufficient evidence from which a marriage may be *prima facie* inferred, suggests its limit. If, in the case itself, or in facts attending upon it, there is, besides that from which marriage may be presumed as already explained, matter also upon which the same presumption of innocence may likewise operate with the contrary result, as showing the parties not to be married, then, since inference stands against inference, first, that there is a marriage, and, secondly, that there is not, the conflicting inferences nullify each other, and amount to nothing.[3] A plain case of this sort would be, where a man should be found living with two women at the same time as his wives: here, since in law he could have but one wife, and since the presumption of innocence would, while attempting to make woman A his wife, make woman B his wife also, and thereby show woman A not to be his wife, — presumption nullifying presumption, — the case must be considered

[1] Matter of Taylor, 9 Paige, 611, 617. See also Westfield *v.* Warren, 3 Halst. 249; Stevenson *v.* McReary, 12 Sm. & M. 9, 56; Hervey *v.* Hervey, 2 W. Bl. 877. But see Raynham *v.* Canton, 3 Pick. 293.

[2] In the Matter of Taylor, supra.

[3] And see Bishop Stat. Crimes, § 608, 609.

the same as though there were no presumption of innocence known to the law. And where the facts are not so palpable as these, still, if the presumption of innocence would draw opposite inferences, though not exactly of equal force, the law cannot well distinguish between the one and the other, and give effect to the weightier or more powerful one, and cast aside the one less weighty or less powerful.[1]

§ 440 *a*. **Continued.** — A case illustrating this doctrine in a somewhat different way occurred in Wisconsin. It was an indictment for polygamy, and the question was as to the proof of the first marriage, which was celebrated in Prussia. We shall see, that, in a polygamy case, the proof cannot be by showing mere cohabitation and repute, but the fact must be otherwise established. Evidence was in this instance given, that, under the Prussian law, a marriage to be valid must be entered into as a civil contract before a civil magistrate; in practice, however, the parties generally have some form of religious solemnization following the civil; but the former is forbidden by law, under severe penalties, until the latter has taken place. In this instance, the religious ceremony only was shown; and, as the persons engaged in it would have been guilty of crime unless the civil had been performed, it was urged that the presumption of the innocence of those persons would sufficiently sustain the inference of its performance. But the court rejected this view of the case; Paine, J., observing of the point: "Perhaps, under the justly liberal rule in respect to proof of foreign marriages in civil suits, it would be allowed to prevail. But to give it that effect in a criminal prosecution would be to overcome the presumption of the prisoner's innocence by the no stronger presumption of the innocence of a stranger, and that in a proceeding in which such stranger was not on trial. This is not consistent with the strictness required in criminal prosecutions. In these, there must be proof, either direct or circumstantial, having some intrinsic tendency to establish the facts showing guilt."[2]

[1] And see, upon this subject, the observations of Edwards, J. in Clayton *v.* Wardell, 5 Barb. 214; of Robinson, C. J. in Breakey *v.* Breakey, 2 U. C. Q. B. 349, 353, 358; and of Cope, J. in Case *v.* Case, 17 Cal. 598, 601.

[2] Weinberg *v.* The State, 25 Wis. 370, 376. And see post, § 450, 451.

§ 441. **Continued — Polygamy — Crim. Con.** — If, in this case of the Prussian marriage, the prosecuting power had undertaken to prove cohabitation in Prussia, and then had asked the court to direct the jury, that, seeing the cohabitation if there was no lawful marriage would at least be a violation of good morals and the established order of society, they should therefore infer a marriage from it, the answer would have been the same in effect which the court gave to the case as it was actually presented in the proofs. The two presumptions, first, that the cohabitation in Prussia under the first supposed marriage was innocent, and, secondly, that the same in Wisconsin under the second supposed marriage was innocent, would not stand together, and the one would nullify the other. Therefore the cases most commonly mentioned, in which proof of cohabitation, with its attendant shadow, reputation, is not sufficient to establish marriage, are indictments for polygamy and actions for criminal conversation. In the latter class there is another reason also assigned for this conclusion; namely, that, if this species of proof were held sufficient, defendants might be charged on evidence made by the parties who bring the action.[1] But this cannot be the controlling reason; since, in all other civil causes, the evidence of cohabitation and repute is received in favor of the plaintiffs, as presumptive proof of their own marriage; and, generally, it has been considered to have the same significance in the hands of a husband setting up his own marriage as in those of any other person.[2] It has also

suppose the decision in this case is right, particularly as this was a foreign marriage, and that it would have been the same if the marriage had been a domestic one. Yet we shall see further on (post, § 479, 480, and various other places), that, where official persons are required by law to keep a record of marriages, the record may be shown in evidence on the ground that they must be presumed to have done their duty, and not to have exposed themselves to the penalties of the law, and this evidence is good in criminal cases and actions for *crim. con.* the same as in any other. This is a sort of putting the presumption of the innocence of third persons to overcome the presumed innocence of the defendant. We cannot expect to find the adjudged law precisely harmonious with its reasons at all points; but, in this instance, the cases are probably distinguishable in matter of principle. Though, in a sense, the record may rest on the presumed innocence of official persons, yet it has in the eye of the law a certain established character for verity of another sort. It is a public depository of fact, such as the mere presumption of an individual's innocence is not.

[1] Morris *v.* Miller, 4 Bur. 2057.

[2] Young *v.* Foster, 14 N. H. 114.

been suggested, that the action for criminal conversation has a mixture of penal consequence in it,[1] — a proposition hardly true in fact; but, admitting this to be so, still, as has been observed, "it cannot be contended that, when the same fact comes in dispute in a civil and criminal case, the law requires other and different evidence to establish such fact in the one case from what it requires to establish the fact in the other."[2]

§ 442. **Cases enumerated where Cohabitation not enough.** — The marriage, therefore, has been required to be proved by evidence other than of cohabitation and repute in actions for criminal conversation,[3] and in indictments for polygamy,[4] for adultery,[5] for incest,[6] and for loose and lascivious cohabitation.[7] But as this action and these indictments are the only cases which have yet arisen wherein the plaintiff tenders the issue, that one of two cohabitations, or acts of commerce between the sexes, is criminal and the other innocent, the marriage is frequently said to be provable, in all other cases, by cohabitation and repute.[8]

§ 443. **Cases enumerated in which the Presumption applies.** — Therefore the evidence which rests on the presumption of

[1] Burt *v.* Barlow, 1 Doug. 171; Fornshill *v.* Murray, 1 Bland, 479, 482; Taylor *v.* Shemwell, 4 B. Monr. 575.

[2] Warner *v.* Commonwealth, 2 Va. Cas. 95. See also Clayton *v.* Wardell, 5 Barb. 214; Means *v.* Welles, 12 Met. 356, 361. "A fact," says Lord Chancellor Erskine, "must be established by the same evidence, whether it is to be followed by a criminal or civil consequence." Lord Melville's Case, 29 Howell St. Tr. 550, 764.

[3] Morris *v.* Miller, 4 Bur. 2057, 1 W. Bl. 632; Birt *v.* Barlow, 1 Doug. 171; Hemmings *v.* Smith, 4 Doug. 33; Catherwood *v.* Caslon, 13 M. & W. 261.

[4] People *v.* Humphrey, 7 Johns. 314; Steer's Case, 2 N. Y. City Hall Rec. 111; Phelan's Case, 6 N. Y. City Hall Rec. 91; Truman's Case, 1 East P. C. 470; Clayton *v.* Wardell, 4 Comst. 230, 5 Barb. 214. See Cayford's Case, 7 Greenl. 57.

[5] The State *v.* Wedgwood, 8 Greenl. 75; Commonwealth *v.* Norcross, 9 Mass. 492; The State *v.* Hodgskins, 19 Maine, 155; The State *v.* Annice, N. Chip. 9.

[6] The State *v.* Roswell, 6 Con. 446.

[7] Commonwealth *v.* Littlejohn, 15 Mass. 163.

[8] Northfield *v.* Vershire, 33 Vt. 110; Archer *v.* Haithcock, 6 Jones, N. C. 421; Thorndell *v.* Morrison, 1 Casey, 326; People *v.* McCormack, 4 Parker, 9; Harman *v.* Harman, 16 Ill. 85; Donnelly *v.* Donnelly, 8 B. Monr. 113; Chiles *v.* Drake, 2 Met. Ky. 146; Fornshill *v.* Murray, 1 Bland, 479; Taylor *v.* Robinson, 29 Maine, 323; Henderson *v.* Cargill, 31 Missis. 367; Spears *v.* Burton, 31 Missis. 547; Senser *v.* Bower, 1 Pa. 450; Fetts *v.* Foster, 2 Hayw. 102; Leader *v.* Barry, 1 Esp. 353; The State *v.* Winkley, 14 N. H. 480, 494; Young *v.* Foster, 14 N. H. 114; Weaver *v.* Cryer, 1 Dev. 337; Taylor *v.* Shemwell, 4 B. Monr. 575; Fenton *v.* Reed, 4 Johns. 52; Ford *v.* Ford, 4 Ala. 142; Arthur *v.* Broadnax, 3 Ala. 557.

innocence — namely, proof of cohabitation and the reputation of marriage — is held to be sufficient in questions of legitimacy;[1] it was so held, even in a case where the plaintiff sought to recover as heir of his deceased brother during the lifetime of his father, who was not called as a witness;[2] in actions for dower, where a woman seeks to recover as widow of the deceased,[3] or where as such widow she seeks to inherit his property;[4] in favor of husband and wife who jointly, as such, bring an action of detinue,[5] or ejectment,[6] or any other ordinary civil action;[7] in an action by the husband, for slander in asserting that he was living in concubinage with the woman whom he claims to be his wife;[8] in an action against husband and wife, for a breach of the wife's promise made before her marriage to marry the plaintiff,[9] or to charge land holden in the name of the wife as the property of the husband;[10] and in settlement cases.[11] It seems, however, to have been held in Kentucky, that evidence of cohabitation and repute is insufficient proof of the marriage, in a suit by the relatives of the supposed wife against the supposed husband, for the property of the supposed wife deceased;[12] and, on the other hand, it was said in a previous case, by way of dictum, that proof of reputation merely would be sufficient to establish a former marriage so as to render void a subsequent one duly proved.[13] Both these propositions are adverse to the general principle; and, if in Kentucky they are law, they are not so elsewhere, unless in cases found to rest on some peculiar reason.[14]

§ 444. **Further of Presumption leading to Conflicting Inferences.**

[1] Clayton *v.* Wardell, 5 Barb. 214; Senser *v.* Bower, 1 Pa. 450; Eaton *v.* Bright, 2 Lee, 85, 6 Eng. Ec. 47; Cheseldine *v.* Brewer, 1 Har. & McH. 152.

[2] Fleming *v.* Fleming, 4 Bing. 266, 12 J. B. Moore, 500.

[3] Young *v.* Foster, 14 N. H. 114; Sellman *v.* Bowen, 8 Gill & J. 50; Chambers *v.* Dickson, 2 S. & R. 475; Graham *v.* Law, 6 U. C. C. P. 310; Pearson *v.* Howey, 6 Halst. 12; Stevens *v.* Reed, 37 N. H. 49; Fleming *v.* Fleming, 8 Blackf. 234.

[4] Stover *v.* Boswell, 3 Dana, 232.

[5] Crozier *v.* Gano, 1 Bibb, 257.

[6] Hammick *v.* Bronson, 5 Day, 290.

[7] Boatman *v.* Curry, 25 Misso. 433.

[8] Hobdy *v.* Jones, 2 La. An. 944.

[9] Pettingill *v.* McGregor, 12 N. H. 179.

[10] Jenkins *v.* Bisbee, 1 Edw. Ch. 377.

[11] Rex *v.* Stockland, Bur. Set. Cas. 508; Newburyport *v.* Boothbay, 9 Mass. 414.

[12] Kuhl *v.* Knauer, 7 B. Monr. 130.

[13] Sneed *v.* Ewing, 5 J. J. Mar. 460, 491. And see Donnelly *v.* Donnelly, 8 B. Monr. 113. Contra in Pennsylvania, Senser *v.* Bower, 1 Pa. 450.

[14] See, however, post, § 445.

— A right understanding of the doctrine now under discussion, with its reasons, is so important that further illustrations of it seem to be demanded. If, as already observed,[1] in the facts of a case it appears that the party has cohabited under two supposed marriages, and the first supposed husband or wife was alive during the second cohabitation, there, as the presumption of innocence would establish marriages in the two instances alike, and as both marriages cannot be lawful ones, the law cannot rest its decision upon this presumption, but it must demand further, and a different kind of proof. Thus it was said, in an Upper Canada case: "If Andrew Breakey, after cohabiting many years with this defendant, had, during her lifetime, married another woman in this country, he would, by that act, have destroyed the presumption of his marriage with the defendant, which would otherwise have arisen from the fact of cohabitation. He would have shown by it, what the law could not have presumed, that he was willing to incur the moral guilt of living with a woman as her husband, when he was not her husband, for, inevitably, this must have been the case in regard to one or the other of the women, when both were, to his knowledge, living at the same time. The consequence then would have been, that, if charged with bigamy in contracting the second marriage, the presumption would rather have been against the fact of the first marriage, for cohabitation would, in such a case, have supplied none in its favor; and the inference would rather be, that he must have been aware there was no sufficient ground for the reputation of the first marriage, or he would not have incurred the guilt of felony, and the danger which attends it, by marrying again. Upon a trial for bigamy, therefore, the prosecutor would have been required to show a good marriage in fact with this defendant."[2] And this whole course of reasoning shows, that, in the opinion of the learned judge, the case of bigamy is only an illustration of the general doctrine, which prevails in all cases where the reasoning is applicable. In another Upper Canada case it was laid down, that the presumption of marriage arising from cohabitation may be rebutted

[1] Ante, § 441.

[2] Breakey *v.* Breakey, 2 U. C. Q. B. 349, 358, opinion by Robinson, C. J.

by proving the woman to have lived with another man in such a manner as to raise the same presumption of marriage with him.[1] Yet where the marriage sought to be established — still following up the doctrine — was shown to have existed as a fact, and cohabitation was shown to have followed the fact, this direct proof of an actual marriage was held not to be rebutted by proof of a previous cohabitation merely, by one of the parties, with a former apparently matrimonial partner.[2]

§ 445. **Continued.** — There is a North Carolina case in which, under instructions from the court, in circumstances similar to those attending the last-mentioned Upper Canada case, the jury found in favor of the first marriage, which was proved merely by cohabitation and repute, with the birth of children and the like, and against the second, where the actual fact of marriage was shown. And the court, by Pearson, C. J., observed: "It is held to be a general rule, that reputation, cohabitation, and the declaration and conduct of the parties are competent evidence of a marriage between them, except in two cases, that is, on an indictment for bigamy, and in an action for *crim. con.*[3] The reason given by Lord Mansfield for making an exception in the action for *crim. con.* is, that 'it is penal in its nature and like a criminal proceeding.' But in criminal proceedings, it is confined to an indictment for bigamy, and no particular reason is given for making that exception; it would seem that what is competent evidence in one case ought to be in another, provided it satisfied the jury of the fact of the alleged marriage. But these two exceptions are fixed, and *stare decisis*. We are not, however, disposed to make another exception without a reason; especially as, in this State, there is no registry of marriages, and frequently circumstantial evidence is the only mode of proving one."[4] It is only necessary to say of this North Carolina case, that it is at variance, not only with the views here laid down, but also,

[1] George *v.* Thomas, 10 U. C. Q. B. 604.

[2] Wheeler *v.* McWilliams, 2 U. C. Q. B. 77, 3 ib. 165.

[3] Referring to 2 Greenl. Ev. § 762; Burt *v.* Barlow, 1 Doug. 171; Morris *v.* Miller, 4 Bur. 2057; Wilkinson *v.* Payne, 4 T. R. 468; Weaver *v.* Cryer, 1 Dev. 337.

[4] Archer *v.* Haithcock, 6 Jones, N. C. 421, 422, 423.

as the writer believes, with the general English and American doctrine.

§ 446. **Continued.** — Thus, in Vermont, where in a pauper case it was set up that a woman living with a particular man as his wife was not legally such, because, it was said, she was antecedently the legal wife of another, the court required evidence of an actual marriage in the previous instance, and declined to hear evidence merely of cohabitation and reputation.[1] In like manner, in New York, where, in a legitimacy case, an actual marriage between the parents was proved, it was held — so it seems, though there were several points in the case, and the judges were not all of one mind — that this fact of marriage could not be overthrown by showing, on the strength of cohabitation and reputation, a pre-existing marriage of one of the parties.[2] Thus, also, in England, where two women severally claimed administration of the effects of the deceased as being his widow, and the one who was last married to him offered to show, that his marriage to the other woman was void by reason of his then having alive a former wife, who afterward, and before the last marriage, died, — evidence of cohabitation and repute was held to be insufficient to establish the first marriage, notwithstanding both parties to it were dead; but, on the other hand, the marriage must, as an actual fact, be proved.[3] So where there was considerable evidence of a former marriage to a person who was living at the time when the marriage in controversy was said to have been entered into, strong proof of the second marriage was required.[4]

§ 447. **Application of the Presumption to Questions of Legitimacy.** — The presumption of innocence avails children on the question of their legitimacy. Though a child is not the legitimate offspring of a particular man, — that is, is not his offspring in law any more than in fact, — if not he, but another, begat the child, still, as matter of proof, the child can avail

[1] Poultney *v.* Fairhaven, Brayton, 185.

[2] Clayton *v.* Wardell, 4 Comst. 230, 5 Barb. 214. See also Houpt *v.* Houpt, 5 Ohio, 539, Wright, 156; Taylor *v.* Taylor, 2 Lee, 274, 6 Eng. Ec. 124; Jackson *v.* Claw, 18 Johns. 346; Phelan's Case, 6 N. Y. City Hall Rec. 91; Senser *v.* Bower, 1 Pa. 450.

[3] Taylor *v.* Taylor, 1 Lee, 571, 5 Eng. Ec. 454.

[4] Conran *v.* Lowe, 1 Lee, 630, 638. See also Brown *v.* Brown, 1 Des. 196.

itself of this presumption of innocence; and, though the mother was living in adultery at the time of the conception, yet if the husband had access to the wife, or at all events if he had intercourse with her, the child shall be presumed to be the husband's and not the adulterer's.[1] "The law will not," observes Mr. Best, "in that case allow a balance of evidence as to who was most likely to be the father of the child."[2] Said Lord Langdale: "In cases where opportunities have occurred, and in which any one of two or more men may have been the father, whatever probabilities may exist, no evidence can be admitted to show that any man other than the husband may have been, or probably was, the father of the wife's child. Throughout the investigation, the presumption in favor of the legitimacy is to have its weight and influence, and the evidence against it ought, as it has been justly said, to be strong, distinct, satisfactory, and conclusive."[3] To rebut the presumption of legitimacy, there must be such affirmative proof on the other side as shall show conclusively, that the husband could not be the father.[4] And, to make this point more sure, the law will not allow the evidence of husband or wife to be received to establish the fact of non-access.[5]

§ 448. **Continued.** — There is a Tennessee case in which it was held, that, under the circumstances, though the child was begotten and born while the alleged parents were living together as husband and wife, yet it should not be deemed to be the child of the husband. Said the judge: "The proof of her [the wife's] notoriously licentious conduct; the imbecile character of her husband; the habit of intimacy between her and Morgan [the paramour]; the expressed opinion of both Morgan and herself that Lucinda [the child claiming to be legitimate] was his child; the dying declaration of Owen Franklin [the hus-

[1] Hargrave *v.* Hargrave, 9 Beav. 552; and the other cases cited to this and the next sections.

[2] Best Ev. 2d Lond. ed. 418; referring to Banbury Peerage Case, 1 Sim. & S. 153; Head *v.* Head, 1 Sim. & S. 150; Morris *v.* Davis, 5 Cl. & F. 163; Barony of Saye & Sele, 1 H. L. Cas. 507; Wright *v.* Holdgate, 3 Car. & K. 158.

[3] Hargrave *v.* Hargrave, supra, p. 555.

[4] Phillips *v.* Allen, 2 Allen, 453.

[5] Rex *v.* Sourton, 5 Ad. & E. 180, 6 Nev. & M. 575; Page *v.* Dennison, 1 Grant, 377, 5 Casey, 420; Rex *v.* Reading, Cas. temp. Hardw. 79; Patchett *v.* Holgate, 3 Eng. Law & Eq. 100, 15 Jur. 308; Rex *v.* Rook, 1 Wils. 340.

band], that she was not his; the want of resemblance to his family, and the striking one to that of Morgan; the fact that Mrs. Franklin, when she abandoned her husband, carried this child with her to Morgan, that they claimed it and gave it her name, all prove to a moral certainty that Lucinda was not the child of Owen Franklin."[1] This case presents very clearly the point, that, when the evidence shows, to a moral certainty, the husband not to be the father of the child, the law holds it to be illegitimate, though there was access, and there was no physical impossibility in the case. It is difficult to resist the conviction that this doctrine does not accord with the decisions of some other tribunals in this country and in England, whatever may be our opinion of it, as a matter resting in inherent justice, or general legal reason. Said Lord Langdale, in the case cited in the last section: "A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence, showing that the husband was: 1. Incompetent; 2. Entirely absent, so as to have no intercourse or communication of any kind with the mother; 3. Entirely absent, at the period during which the child must, in the course of nature, have been begotten; or, 4. Only present, under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse."[2] It has been intimated in England, that, though the husband had opportunities of sexual intercourse with his wife, yet, if he was living separate from her and she was living in adultery, such intercourse would not be conclusively presumed;[3] and the House of Lords even held, that, in such a case, presumptive proof may be received, showing no such intercourse to have existed; but, in the very case in which this was adjudged, the Lord Chancellor Cottenham, as to the main issue, observed: "The point to which I am to direct my attention, as a question of fact, is this: whether the circumstances are such

[1] Cannon *v.* Cannon, 7 Humph. 410, 411.

[2] Hargrave *v.* Hargrave, 9 Beav. 552, 555.

[3] Cope *v.* Cope, 5 Car. & P. 604; Shelly *v.* ——, 13 Ves. Jr. 56, 58; Reg. *v.* Mansfield, 1 Q. B. 444; 1 Gale & D. 7; Head *v.* Head, Turn. & Russ. 138, 1 Sim. & S. 150; Goodright *v.* Saul, 4 T. R. 356, 358.

as to satisfy me that no sexual intercourse did take place between these parties [the husband and wife who were living separate] at the period to which reference is had."[1] And in another case Sir John Leach, M. R., said: "If it were proved that she [the wife] slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate."[2] And the general American doctrine is believed to be, on this point, perhaps in accord with these English views.[3] At the same time there are American cases, besides the Tennessee one above cited, which lay it down that the ancient rule has been relaxed on this subject,[4] and that the question is one of fact for the jury.[5] If a case like that in Tennessee should arise in another State, in which the question was not definitively settled, a practitioner might deem himself not without hope of success should he urge upon the court the Tennessee doctrine.

§ 449. **Continued.** — According, therefore, to what appears to be the established English doctrine, and perhaps the doctrine most prevailing in the United States, there is a difference in the nature of the presumption of innocence, as applied to marriage, or as applied to the legal question of legitimacy. In the former case, the conclusion resulting from this presumption may be shown to be incorrect in fact; but in the latter case, although the wife received the embraces of a paramour, yet if she received also her husband's, the issue shall be presumed to have sprung from the innocent embrace, and this presumption, if there was no incapacity in the husband, shall be held in law to be conclusive. As already intimated, there may be doubt, whether, as matter of correct principle, the Tennessee doctrine should not be preferred; for there seems to be no reason, in justice, for holding a husband to the consequence of this doc-

[1] Morris *v.* Davis, 5 Cl. & F. 163, 215, 216; s. p. p. 242.

[2] Bury *v.* Philpot, 2 Mylne & K. 349, 352. To the same effect, see Morris *v.* Daveis, 3 Car. & P. 215, 427; Rex *v.* Luffe, 8 East, 193; and see the cases cited to the last section.

[3] Kleinert *v.* Ehlers, 2 Wright, Pa. 439; Van Aernam *v.* Van Aernam, 1 Barb. Ch. 375; Stegall *v.* Stegall, 2 Brock. 256; Page *v.* Dennison, 1 Grant, 377, 5 Casey, 420; Phillips *v.* Allen, 2 Allen, 453. See Wright *v.* Hicks, 12 Ga. 155; Bowles *v.* Bingham, 2 Munf. 442, 3 Ib. 599.

[4] Herring *v.* Goodson, 43 Missis. 392.

[5] Blackburn *v.* Crawfords, 3 Wal. 175.

trine, where all the world, including the judge and the jury, know the fact to be otherwise than the doctrine establishes it as being. At the same time, the presumption of legitimacy should be held very strongly, and no rebutting proof be permitted to overturn it except in the clearest case.

II. *The Presumption that Official Persons have done their Duty.*

§ 450. **Doctrine defined — Marriage Record — Publication of Banns.** — The same presumption which was considered under the last sub-title, still goes with us, as has already been explained,[1] into this. "All persons," observes Mr. Best, "are presumed to have duly discharged any obligation imposed on them either by written or unwritten law;"[2] that is, are presumed to be innocent. And Lord Ellenborough remarked: "Where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burden of proving the contrary, that is, in such case of proving a negative, on the other side."[3] The effect of a record of marriage, kept by the clergyman or kept by the civil authority, in proof of a marriage, will be considered in another chapter. But when such record is received, there is no need to go behind it to show an antecedent publication of banns, or that the marriage was celebrated in any particular mode, or any other formality which the law may make essential to its constitution; because the law presumes that all persons connected with the solemnization and with the recording of the marriage have done their duty, and this presumption holds good until the contrary fact is made to appear by proof.[4]

§ 451. **Why — Record, continued — Consent of Parents.** — We see, therefore, the reason on which this doctrine rests. It is, in other words, that persons so situated are presumed not

[1] Ante, § 435.

[2] Best Ev. 2d Lond. ed. 415.

[3] Williams *v.* East India Co., 3 East, 192, 199.

[4] Milford *v.* Worcester, 7 Mass. 48; St. Devereux *v.* Much Dew Church, 1 W. Bl. 367; Steadman *v.* Powell, 1 Add. 58, 2 Eng. Ec. 26, 33. And see Wray *v.* Doe, 10 Sm. & M. 452. Otherwise of a register kept only as a matter of custom, but not in pursuance of any law establishing it. Saunders *v.* Saunders, 10 Jur. 143; Lloyd *v.* Passingham, Cooper, 152.

needlessly to expose themselves to the penalties of the law;[1] and this reason applies, whether the statute upon the subject contains an express penalty for disobedience, or not; for a legislative act of this sort, inflicting no penalty, is in the highest degree penal, a breach of its requirements being punishable by fine and imprisonment.[2] There are some English cases wherein, on trials for polygamy, while marriages were in England regulated by Stat. 26 Geo. 2, c. 33, it appearing that the marriage to be proved was by license, and that the statute made the marriage void when celebrated without the consent of parents, the party being under age, and the statute requiring the registering officer in such cases to state in the record the fact of the parental consent being given, — where the record was produced in evidence, and on its face it was defective in omitting this matter of the parental consent, — the judges held, that, when the prisoner had shown himself by proof to have been under age at the time mentioned in the record, it devolved on the prosecutor to prove the consent of his parents.[3] Since, as we have already seen, the law ordinarily presumes the consent of parents where the actual solemnization of the marriage of a minor has been shown,[4] the doctrine of these cases may perhaps be reckoned as belonging to the strong meat of the law. At the same time, when we bear in mind that, the case being a criminal one, the question is, whether the official person or the defendant is the one who committed crime, and presumption balances presumption, the adjudication does not differ much in point of principle from one already stated by the Wisconsin court.[5]

III. *The Presumption of Life.*

§ 452. **What it is — Conflicting with Presumption of Innocence — When Death presumed.** — Sometimes the presumption of innocence is found to be in conflict with the presumption of the continuance of life; and, in such a case, if there is no evidence to show what the fact really is, the one or the other of

[1] Piers *v.* Piers, 2 H. L. Cas. 331.

[2] 2 Burn Ec. Law, 489; 1 Bishop Crim. Law, 5th ed. § 237, 238; Bishop Stat. Crimes, § 138.

[3] Rex *v.* James, Russ. & Ry. 17; Rex *v.* Morton, Russ. & Ry. 19, note; Rex *v.* Butler, Russ. & Ry. 61.

[4] Ante, § 294.

[5] Ante, § 440 *a*.

these presumptions must give way. The general presumption of life, where a person is absent and not heard from, is, that the life is continuing if the absence has not extended to seven years; but after seven years death is presumed. Seven years must elapse before the presumption of death arises; but, when this period is passed, there is no presumption that the life continued during the entire period, or that it was extinguished at any particular time within it. Indeed the rule of seven years is not an absolute one; but any circumstances may be shown creating a probability that life did not continue so long.[1] Thus stands the question upon the naked presumption of life or death; but, when the presumption of innocence is brought in to oppose in a particular instance the presumption of life, it is often found to be the more powerful of the two, and thus to overbear the weaker one. How this is, upon the authorities, we shall now see.

§ 453. **Second Marriage where Former Consort living at Antecedent Date.** — When a marriage is directly proved, but a previous marriage is shown in answer to this proof, and it is shown that the former husband or wife was living within seven years, the law makes no absolute decision between the two conflicting presumptions of innocence and of life, but in a general way it prefers the presumption of innocence.[2] The question of life or death in such a case is, however, one of fact for the jury.[3] And the finding by a jury has been considered just which sustained a marriage entered into after one year's absence of a party to a former marriage;[4] and another, which refused to sustain a marriage celebrated within twenty-five days after the time when such absent party was known to be alive.[5] Where the court below refused to instruct the jury that the death of the former husband should be presumed at the time of the second marriage, which took place two years after he was last known to be alive, and the jury found against

[1] 1 Greenl. Ev. § 41 and note; Rex *v.* Harborne, 2 Ad. & E. 540; Cofer *v.* Thurmond, 1 Kelly, 538; Newman *v.* Jenkins, 10 Pick. 515; Wambaugh *v.* Schenck, Pennington, 229; The State *v.* Moore, 11 Ire. 160; Gilleland *v.* Martin, 3 McLean, 490.

[2] Senser *v.* Bower, 1 Pa. 450; Bishop Stat. Crimes, § 611. See, also, Gibson *v.* The State, 38 Missis. 313; Dixon *v.* People, 18 Mich. 84.

[3] Reg. *v.* Lumley, Law Rep. 1 C. C. 196.

[4] Rex *v.* Twyning, 2 B. & Ald. 386.

[5] Rex *v.* Harborne, 2 Ad. & E. 540.

the second marriage, the verdict was set aside and a new trial ordered.[1] It has been questioned whether the last case did not err in making the presumption of innocence over that of life one of law rather than of fact.[2] At the same time, looking at this question as one of fact, which undoubtedly it was, the verdict showed such misapprehension of true principles on the part of the jury, as might well justify a court in setting it aside for this reason.

§ 454. **Continued.** — Perhaps it would be well for the courts to establish, were it possible, some rule to determine when the presumption of life should, if ever, overcome the presumption of innocence. But plainly this has not yet been done, nor does it seem possible it should be; so we must grope after the facts of particular cases, and derive from them such light as we may.[3] Doubtless the cases are rare in which there is not some circumstance, or some piece of testimony, co-operating with the one or the other of these presumptions.[4] Thus, in a Texas case, the doctrine appears to have been laid down, that a conviction may be had on an indictment for an unlawful marriage, founded upon a strong presumption of the life of the first husband or wife, without express proof of the fact. In this particular instance, the first wife was shown to have been alive four months preceding the second marriage; and there was the further ingredient, that, after the second marriage, the husband had said his first wife was still living, — a statement which he might not have known to be true, as her residence was some three hundred miles away. But the judge very correctly said,

[1] Greensborough *v.* Underhill, 12 Vt. 604.

[2] Northfield *v.* Plymouth, 20 Vt. 582, 590. See also Lapsley *v.* Grierson, 1 H. L. Cas. 498, 505; Sneed *v.* Ewing, 5 J. J. Mar. 460, 492; Starr *v.* Peck, 1 Hill, N. Y. 270: Jackson *v.* Claw, 18 Johns. 346; Yates *v.* Houston, 3 Texas, 433.

[3] In the following cases the presumption of innocence prevailed, and it is very plain that the result was just: Yates *v.* Houston, 3 Texas, 433; Chapman *v.* Cooper, 5 Rich. 452; Canady *v.* George, 6 Rich. Eq. 103.

[4] "If, for example," said Lush, J. in Reg. *v.* Lumley, Law Rep. 1 C. C. 196, 198, "it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way."

that, be his statement according to the real fact or not, yet, since he believed it true, it shows a willingness on his part to violate the law, and so "takes away from him the opposing presumption of innocence. He evidently believed, at the time of the second marriage, that his wife was living, and he was warned by the witness," &c. Therefore he was properly convicted.[1] But if there had been no confession, the case evidently would have worn a very different aspect, though possibly even then a conviction might have been just. A woman petitioned, in Mississippi, for dower as the widow of a certain man deceased. Her claim was resisted on the ground that this man had, at the time of the marriage, a wife still living in Georgia. It was proved, that, four years before the marriage, this man was living with a woman whom he treated as his wife; and that, after the marriage, he, in the presence of this his second wife, said his first wife was living. Yet the second marriage was held to be good. Said Fisher, J.: "The fact that the deceased was living, in 1844, with a woman believed to be his wife, is no evidence that she was living on the 6th of December, 1848. The marriage having been solemnized according to the forms of law, every presumption must be indulged in favor of its validity. The statement of Rawls [the husband], while it could have been used as evidence against him, in a proceeding in which he was directly interested, or could be affected, cannot be used to the prejudice of the petitioner. By consummating the marriage, he admitted that he could then legally enter into the alliance. The statement may have been true, that the first wife was then living; and still it would not necessarily follow that she was in a legal sense his wife, as the parties may have been legally divorced."[2]

§ 455. **Continued.** — There is an old Massachusetts case, which, as reported by Mr. Dane, is hardly reconcilable with the foregoing views. There, on a suit brought by a woman for dower out of the estate of one Stephens, whose wife she had been, and a plea in bar that she had *eloped* from him and lived in adultery with one Welman, whereby she had forfeited her dower, it appeared, the suit being in 1789, that, in April, 1775,

[1] Gorman *v.* The State, 23 Texas, 646, 648, 649.

[2] Hull *v.* Rawls, 27 Missis. 471. And see Myatt *v.* Myatt, 44 Ill. 473.

she and Stephens were living together at Salem as husband and wife, that he sailed on a voyage for the West Indies, was shipwrecked, and with his crew taken up and carried to Charleston, South Carolina. In September of the same year, information came that he was enlisted in the South Carolina army. In the February following she went to keep Welman's house, and was married to him in August or September, 1776, about a year from the time when her former husband was last known to be alive. There was a verdict and judgment for the defendant. "The court," says the reporter, "held that all her connections with Welman were adulterous, and her marriage with him totally void; and that she clearly lost her dower in Stephens's estate by these illegal connections with Welman." [1]

§ 456. **Continued.** — The reader should remember that, according to the doctrine which presumes a person to be dead after an absence, unheard from, of seven years, there is still no presumption as to the particular time, when, within the seven years, the death took place.[2] Therefore in such of the foregoing cases as did not come to litigation till more than the seven years had elapsed, there was no great need of help from the presumption of innocence in order to sustain the marriage; and it is always material to consider, not alone the period which intervened between the last knowledge of the life of the former husband or wife and the second marriage, but also between it and the date when the litigation is conducted.

IV. *The General Presumption in Favor of Marriage.*

§ 457. **The Doctrine what.** — This presumption was mentioned and somewhat commented upon in an earlier section of this volume.[3] *Semper præsumitur pro matrimonio.* Every intendment of the law is in favor of matrimony. When a marriage, therefore, has once been shown, however celebrated, whether regularly or irregularly, or however proved, whether

[1] Mass. S. J. Court, Nov. T. 1789, Welman *v.* Nutting, 2 Dane Abr. 305. For a late Massachusetts decision on the presumption of death in such cases, see Kelly *v.* Drew, 12 Allen, 107. It is now held in Massachusetts that the defence of elopement and living in adultery is not good in bar of dower in this State. Lakin *v.* Lakin, 2 Allen, 45.

[2] Ante, § 452.

[3] Ante, § 13.

directly or by circumstantial evidence, the law raises a strong presumption in favor of its legality: so that the burden is with the party objecting, throughout, and in every particular, to prove, against the constant pressure of this presumption of law, that it is illegal and void. And it has been considered, that the validity of a marriage cannot be tried like any other question of fact which is independent of presumption; because the law, besides casting the burden of proof upon the objecting party, will still presume in favor of the marriage, and this presumption increases in strength with the lapse of time through which the parties are cohabiting as husband and wife.[1] It being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes in its nature matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all presumptions both of law and of fact, presses into its service all things which can help it in each particular case, to sustain marriage and repel the conclusion of unlawful commerce.

§ 458. **Illustration.** — This principle was strongly illustrated in a case which went before the House of Lords on an appeal from Ireland. The marriage was celebrated at a private house in the Isle of Man, between parties who had for a long time lived together apparently as husband and wife. Issue had sprung from this connection, and more was expected, on account of which the parties now determined to enter into a valid marriage. The local marriage act provided, that all marriages celebrated in any other place than the parish church or chapel of the parties should be void, unless they had obtained a special license under the proper hand and seal episcopal of the bishop. The question in this case was, whether the marriage, proved to have been celebrated in a private house, was void by reason of there having been no such

[1] Piers *v.* Piers, 2 H. L. Cas. 231; Steadman *v.* Powell, 1 Add. Ec. 58, 2 Eng. Ec. 26, 30; Catterall *v.* Sweetman, 1 Robertson, 304, 310, 321; Legeyt *v.* O'Brien, Milw. 325, 333; Maxwell *v.* Maxwell, Milw. 290; Else *v.* Else; Milw. 146, 151; 2 Dane, Ab. 297; Smith *v.* Huson, 1 Phillim. 287, 294; Diddear *v.* Faucit, 3 Phillim. 580; Rogers Ec. Law, 2d ed. 631, note; Hubback on Succession, 262; Wilkinson *v.* Gordon, 2 Add. Ec. 152, 2 Eng. Ec. 257, 260; Ward *v.* Dulaney, 23 Missis. 410; Caujolle *v.* Ferrie, 26 Barb. 177.

special license. There was no record that a license had been taken out; but this seemed not at all conclusive, because it was shown that the records had been inaccurately kept. The bishop, however, testified in the most unequivocal terms to his clear recollection of the parties, and to his belief that no such license had been granted by him; and he deposed, that he should not have granted a license to those parties if applied to, since, as they had notoriously lived together in an illicit connection, there ought to be a public celebration of the marriage to show the change in the character of their cohabitation. Yet in respect to this testimony, the facts testified to had occurred many years ago. The Lords, overruling the decision of the Chancellor of Ireland, sustained the marriage; because it was possible, after all, that the bishop was mistaken, or that a special license had been granted a year before the marriage by his predecessor in office, and not recorded.[1]

§ 459. **Conclusion.** — This last-mentioned presumption is one of such a nature, that it will be better considered in connection with the whole course of the proof of marriage, than in sections separately devoted to it. Let now the reader, therefore, carry in his mind the four presumptions discussed in this chapter, and especially the first and last ones, while we proceed, in other chapters, to finish the subject.

[1] Piers *v.* Piers, 2 H. L. Cas. 331. And see particularly the remarks of Lord Campbell, p. 379–381. Consult, in connection with this case, Blackburn *v.* Crawfords, 3 Wal. 175, involving facts somewhat similar.

CHAPTER XXV.

RECORDS AND CERTIFICATES OF MARRIAGE, AND THE LIKE, CONSIDERED AS EVIDENCE OF THE RECORDED FACT.

§ 460. **General Doctrine.** — Having devoted a chapter to a consideration of those several presumptions upon which the proof of marriage in a great measure depends, we may not inappropriately proceed in another separate chapter to take a view of the record proof which almost always may be, and often is, introduced in these cases. And let it be noted here, that the record, when produced, stands not as a presumption, but as a fact. It is therefore equally available in actions for criminal conversation, and in indictments for polygamy and the like, as in ordinary civil causes.

§ 461. **Continued — On what Principle — How.** — If the reader will look into any book on the general law of Evidence, — as, for instance, into Mr. Greenleaf's book, — he will see the principle upon which this kind of proof is admissible.[1] If, then, there is a public officer intrusted with the duty of making and preserving a record of a public nature and interest, the presumption of law is, that the officer does his duty, — a point discussed in our last chapter,[2] — and therefore, and perhaps for some still further reasons, the record is receivable as evidence of the fact before any court of justice. The book itself may be presented, or a certificate of the particular record required may be made by the officer having charge of the book, and this certificate will be received the same as the book; or any third person, competent to be a

[1] 1 Greenl. Ev. § 483 et seq.

[2] Ante, § 450, 451.

witness in court, may in like manner extract from the book the particular record needed, and present it, under the sanction of his oath, before the tribunal. The book, or the certificate of the keeper of the book, as the case may be, requires no oath to make it admissible; though, perhaps, under some circumstances, it may be necessary to introduce to the court some evidence that the book came from the proper custody, or that the certificate is a genuine instrument, emanating from the official person.

§ 462. **How the Chapter divided.** — What we are now specially to consider is the record, or the certificate, which proves the marriage. We shall divide this matter as follows: I. What is a Sufficient Record? II. What is a Sufficient Certificate of the Record? III. What is the Law respecting Certificates of Marriage which do not purport to be Certificates of any Record? IV. How of Private Memoranda in the Nature of Records? V. Special Considerations as to Foreign Records. VI. What Ancillary Proof must attend the Proof by Record?

I. *What is a Sufficient Record?*

§ 463. **General Doctrine — How much the Record proves.** — In the cases which have most frequently arisen, the thing offered in evidence was, not the original record of the marriage, but the certificate of the record. Yet in determining the admissibility of the latter, the sufficiency of the former was the first matter to be considered. The general doctrine is, that where, as in England, and probably all of our States, the law requires marriages to be registered, the record kept in pursuance of law, or the certificate, or otherwise proved copy of it, is admissible in evidence to establish the fact of the marriage.[1] But it proves no facts beyond those which the law requires to be entered in the register.[2] And the record is evidence of no

[1] Milford *v.* Worcester, 7 Mass. 48, 57; Jackson *v.* King, 5 Cow. 237; 1 Phil. on Ev. with C. & H. notes, 410; 2 Burn Ec. Law, 488; Damon's Case, 6 Greenl. 148; The State *v.* Wallace, 9 N. H. 515; Wedgwood's Case, 8 Greenl. 75; Jacocks *v.* Gilliam, 3 Murph. 47, 52; Jackson *v.* People, 2 Scam. 231. See Shorter *v.* Boswell, 2 Har. & J. 359; Trammell *v.* Thurmond, 17 Ark. 203. And see ante, § 450, 451.

[2] Wihen *v.* Law, 3 Stark. 63; 1 Burge, Col. & For. Laws, 83. And see Woods *v.* Nabors, 1 Stew. 172; Perry *v.* Block, 1 Misso. 484.

higher grade than is the testimony of witnesses; consequently it may be contradicted, or shown to be a forgery, or the act of an unauthorized person;[1] it is not, in contemplation of law, "the best evidence."[2]

§ 464. **Continued — Special Views as to Criminal Cases.** — There is a late Michigan case in which the judge observed: "By the English law, a register of marriage is not a clergyman's certificate, but is signed by the parties in the presence of witnesses. Proof of a register there is proof of the act of the party as much as proof of his signature to a deed would be. But a certificate merely signed by the minister, while it may perhaps avail in civil proceedings, if properly supported, cannot avail in criminal trials, where the defendant is entitled to confront the witnesses."[3] In the case in which these observations occur, the paper presented to the court was properly rejected; but, if the learned judge intended to intimate, that the evidence of a record of marriage, kept as such records are authorized to be kept by the laws of this country generally, is inadmissible in a criminal cause, the intimation is certainly not in accord with our judicial decisions in general. And where there is to be proof of a marriage by record, or by any other evidence which does not depend upon the presumption of innocence, there is required no other or different evidence in criminal causes, from what is admissible, or is sufficient, in civil causes.[4]

§ 465. **Marriage Registers in England.** — Marriage registers, as kept under the statutes which for many years have existed in England, are indeed signed by the parties in the presence of witnesses; but the reason why they are admissible is, not because they are so signed, — for if this was the reason, a certified or examined copy would not be receivable, the original must be presented, — but because they are a public record, kept in a public place, under the authority of the law.[5] And it

[1] Rice *v.* The State, 7 Humph. 14. And see Cunninghams *v.* Cunninghams, 2 Dow. 482.

[2] Woods *v.* Woods, 2 Curt. Ec. 516, 7 Eng. Ec. 181, 184.

[3] People *v.* Lambert, 5 Mich. 349, 364, 365.

[4] And see ante, § 441; The State *v.* Wallace, 9 N. H. 515; Wedgwood's Case, 8 Greenl. 75; Jackson *v.* People, 2 Scam. 231; Commonwealth *v.* Littlejohn, 15 Mass. 163.

[5] And see 2 Taylor Ev. 3d ed. § 1430.

is said, in a reporter's note in Carrington & Payne's Reports: "We believe the parties married did not sign their names in the Fleet Registers, nor indeed in any marriage register, previous to Stat. 26 Geo. 2, c. 33."[1] There has been some discussion in the English books, whether the registers of Fleet marriages were admissible in evidence; and, though there were judges inclined to receive them, the question appears to have been ultimately settled adverse to their reception; "because," said Lord Kenyon, "they [the books] come from tainted quarters."[2] How they are "tainted," we have already seen;[3] and the only wonder in the matter is, that any judge should ever have doubted whether they should not be rejected. Whether the register of an English dissenting chapel should be deemed, in England, to be "tainted," is perhaps not quite clear; but, in a suit in the ecclesiastical court, Sir John Nicholl refused to allow copies of such a register to be pleaded; saying, "Extracts from a register of this description must be considered as mere private memoranda. The books themselves, however, may be produced at the hearing of the cause, and be made evidence to a certain extent; by this means the party will have the benefit of them, though in a different manner from that in which they have now been attempted to be introduced."[4] And Baron Parke, in one case, rejected a marriage register kept by a clergyman, — observe, by a single clergyman only, — prior to the Irish marriage act of 1845 going into operation.[5]

§ 466. **Parish Registers, generally.** — In England, parish registers are always admissible in evidence to prove whatever is properly recorded there;[6] and they were so to prove a marriage before Stat. 26 Geo. 2, § 33, "upon," said Holt, C. J., "the nature of the thing."[7] This, of course, refers to registers of the Church of England, kept by its authorities; which, we have

[1] Davies *v.* Gatacre, 8 Car. & P. 578, note.

[2] Reed *v.* Passer, Peake, 231, 1 Esp. 213; Davies *v.* Gatacre, supra; Lloyd *v.* Passingham, 16 Ves. 59, 232; Nokes *v.* Milward, 2 Add. Ec. 386, 2 Eng. Ec. 356.

[3] Ante, § 293. And see the reporter's note to Davies *v.* Gatacre, supra.

[4] Newham *v.* Raithby, 1 Phillim. 315, approved in Warren *v.* Bray, 8 B. & C. 813, 818.

[5] Stockbridge *v.* Quicke, 3 Car. & K. 305.

[6] May *v.* May, 2 Stra. 1073; Stainer *v.* Droitwich, 1 Salk. 281; Love *v.* Bentley, 11 Mod. 134.

[7] Stainer *v.* Droitwich, supra.

seen,[1] were therefore the authorities of the crown and government of England. Consequently it does not follow that the same should be held of a record kept by a religious society in this country. Neither, on the other hand, can we draw any conclusion from the fact, that the records of Fleet marriages, and of marriages the record whereof was kept in dissenting chapels, were rejected in England. For in this country, our religious societies of all denominations are equally cherished by the governing power, yet none of them are placed on any foundation like that whereon rests the Church of England.

§ 467. **American Doctrine.** — In Pennsylvania there is a statute of an ancient date providing, "that the registry kept by any religious society in their respective meeting-book or books, of any marriage, birth, or burial within this province or the territories thereof, shall be held good and authentic, and shall be allowed of on all occasions whatever." And such a record being produced to prove the time of a death, Tilghman, C. J., observed: "This act is in conformity to the principles of the common law. The registry is good evidence of the death; but, before it is admitted, proof must be made of its authenticity. The act is silent as to the mode of proving this; we must therefore have recourse to the common-law proof, which is by producing the original registry, or a copy proved by the oath of a witness who has compared it with the original. It was contended that the German Reform Congregation being a body corporate, a certificate under the seal of the corporation was evidence of the truth of the copy. But I know of no such principle. Corporations, being invisible bodies, can make a contract only by their seal, which is visible. This is from necessity. But there is no necessity for their certifying copies of their acts."[2] And to some extent, at least, the doctrine of this case has, without the aid of a statute, been acted on in this country.[3] At the same time, this is ground upon which the practitioner must tread cautiously, if at all; it cannot be said, that, on this precise question, any doctrine is exactly established as American law.[4]

[1] Ante, § 48.

[2] Stoever *v.* Whitman, 6 Binn. 416.

[3] Huntly *v.* Compstock, 2 Root, 99; Maxwell *v.* Chapman, 8 Barb. 579.

[4] See the discussions in Kennedy *v.* Doyle, 10 Allen, 161.

§ 468. **Form of the Record.** — The cases do not much enlighten us, as to the form in which the record must be kept, in order to be admissible. This undoubtedly will depend somewhat upon the particular statute; yet, in the nature of the case, if the statute does not prescribe an exact form, the keeper of the record must be permitted to exercise a wide discretion respecting it. In one instance, the record, which was admitted, was in these words: "Mr. Amasa C. Vittum and Miss Huldah Wallace, both of Sandwich, were married January 31, 1828, by Jeremiah Furber, Justice Peace. Recorded March 31, 1828, by Charles White, Town Clerk."[1] In another case, the admitted record ran: "Mr. Isaac Wedgwood and Miss Judith Kelly, both of Lewiston, were joined in marriage July 15, 1821. Dan. Reed, Justice of the Peace."[2] The record in still another case was — but this was a record from another State, and it was rejected: "This is to certify, that Robert T. Lambert, of Hudson, in the State of New Jersey, and Nancy J. Mulholland, of Jersey City, in the State of New Jersey, were by me joined together in holy matrimony, on the first day of January in the year of our Lord one thousand eight hundred and fifty-five. (Signed) E. W. Adams, Minister of the Gospel." "In presence of." "Received in the office, and recorded September 12, 1857." This case has already been alluded to;[3] and while, on the whole, we cannot dissent from the conclusion of the court which rejected the record, there were employed by the learned judge some words not quite according with the general doctrine. He said, of the certificate of the record: "It bears no date, and does not either declare where the marriage took place, or show where the minister resided. It does not show, therefore, that he acted within his jurisdiction, or that the marriage took place, as charged in the indictment, in New Jersey. And it does not appear to have been made at or near the time of the marriage. On the contrary, its record being made after the arrest of the prisoner, there is room for presumption the other way."[4] There is grave doubt, whether, to constitute a good record of a marriage, the fact must be recorded at or even near

[1] The State *v.* Wallace, 9 N. H. 515.

[2] Wedgwood's Case, 8 Greenl. 75. As to this case, however, see post, § 473.

[3] Ante, § 464.

[4] People *v.* Lambert, 5 Mich. 349, 352, 365. And see Niles *v.* Sprague, 13 Iowa, 178.

the time when it transpired;[1] though this would depend somewhat on the language of the statute under which the record is made and kept; and, on general principles, there might be dilatoriness, or there might be circumstances attendant on the making up of the record, as in this case, justly leading to its rejection. But to require the record to specify the place of residence of the solemnizing officer, and the locality in which the marriage took place, upon the idea of making a jurisdiction over the matter appear, seems, to the writer, to be going beyond what is reasonable and customary in such cases. Of course, it cannot be necessary to name the State in which the marriage took place; for this is, in the nature of things, presumed to be the State in which the record is made. Even in things so strict as dilatory pleas, there is, in the law, something left to intendment; and surely there should be, in a marriage record.[2]

§ 469. **Continued.** — Where the record from the books of the town was "James Priest, Jr., married October 1, 1795, by James Smith, Justice," omitting to name the person to whom he was married, this was held good in evidence of the fact of the marriage of Priest; leaving the person to whom, and the identity, to be supplied by parol testimony. It was also held to be unnecessary that the record should be signed by the town clerk. It is sufficient if it is in his handwriting.[3] A marriage license is not a record, neither is a bond which is given when it is obtained; "nor," it was observed in a Kentucky case, "was it necessary or proper that either of them should have been recorded."[4] For further light on the subject treated of in this sub-title, the reader, who is searching for every thing, may not unprofitably consult the cases here referred to in a note.[5]

II. *What is a Sufficient Certificate of the Record?*

§ 470. **General Doctrine.** — There is no need for any general

[1] France *v.* Andrews, 15 Q. B. 756. But see Warren *v.* Bray, 8 B. & C. 813, 816.

[2] See Viall *v.* Smith, 6 R. I. 417.

[3] Northfield *v.* Plymouth, 20 Vt. 582, 589. And see post, § 481.

[4] Commonwealth *v.* Rodes, 1 Dana, 595.

[5] Coale *v.* Harrington, 7 Har. & J. 147; Fox *v.* Lambson, 3 Halst. 275; Tandy *v.* Masterson, 1 Bibb. 330; The State *v.* Hasty, 42 Maine, 287; Sharp *v.* Wickliffe, 3 Litt. 10; Galt *v.* Galloway, 4 Pet. 332; Griffin *v.* Reynolds, 17 How. U. S. 609; Jenkins *v.* Davies, 10 Q. B. 314.

discussion under this sub-title; the certificate, to be admissible as such, must be made by the proper person having the charge of the record;[1] it must state the contents of the record, or so much thereof as concerns the particular matter, it being insufficient if it purports to be only a certificate of the parol fact, in distinction from a certificate of the record;[2] and, as we have seen,[3] the opinion was in one case expressed that it must bear a date, — a point, however, upon which grave doubt may be raised; though a date is, of course, highly proper.

III. *Certificates, not of the Record of a Marriage, but of the Marriage itself.*

§ 471. **Certificate accompanying Act of Marriage — Kept by Party, &c.** — In a *nisi prius* case before Baron Parke, there was the proof of a marriage, by a witness who was present; and it was testified also, that the officiating clergyman gave to the woman a certificate of her marriage, which certificate was produced. The learned judge admitted the certificate in evidence.[4] This decision proceeded upon the principle, that the certificate was a part of the original transaction. And there are various circumstances in which a marriage certificate, delivered to the party at the time of the marriage, or kept afterward by the party, or shown by the party, may be admissible, on one ground or another, in support of the allegation of marriage.[5] This is an entirely different thing from the certificate of a marriage record.

§ 472. **Clergyman's Marriage Certificate.** — But where a marriage certificate — that is, a certificate of the fact of marriage, signed by a clergyman or a justice of the peace who purports therein to have solemnized the marriage — is presented as constituting in itself evidence, it is, in England, rejected.[6] Such appears to be the English law; of which, however, the evidence

[1] Commonwealth *v.* Chase, 6 Cush. 248; Coons *v.* Renick, 11 Texas, 134.

[2] Oakes *v.* Hill, 14 Pick. 442; 1 Greenl. Ev. § 498.

[3] Ante, § 468.

[4] Stockbridge *v.* Quicke, 3 Car. & K. 305.

[5] Hill *v.* Hill, 8 Casey, 511; Hubback on Succession, 258. See Piers *v.* Piers, 2 H. L. Cas. 331. In Commonwealth *v.* Morris, 1 Cush. 391, the certificate of a foreign marriage came from the possession, not of the defendant, but of his alleged wife, and it was rejected.

[6] Anonymous, Lofft, 328; Nokes *v.* Milward, 2 Add. Ec. 386, 2 Eng. Ec. 356.

is not very clear. Dr. Swaby rejected the certificate of a Gretna Green marriage, and said: "Even the certificate of the king himself, under his sign manual, is, it is well known, no evidence of a *mere fact*." [1] In an Upper Canada case, however, the Court of Queen's Bench admitted a certificate in the following words: "I do hereby certify that I have this day married Mr. Caleb McWilliams of Oswegatchie to Hephzibat Wheeler, according to the established Church of England. Dated, 31st May, 1801. Robert Baldwin, J. P." Said Robinson, C. J.: "It was a declaration under the hand of a public officer, who is now dead, of his having done a certain act which he was specially authorized by law to do." [2]

§ 473. **Continued — Clergyman's Record.** — The statutes of many of our States make it the duty of those official persons to whom the solemnization of marriage is committed, to keep a record of the marriages by them solemnized, and to transmit from time to time, to the proper recording officer of the town, lists of marriages solemnized, to be by the latter officer recorded in the town books. Since, therefore, the first record is a record made and kept, in pursuance of law, by one who, as to the solemnization of marriage, is a public officer, no reason appears why his record, or his certificate of the contents thereof, should not be just as receivable in evidence as the record, or the certificate of it, by the recording officer of the town. But, beyond this, a practice has in some of the States grown up, of receiving the officiating person's bare certificate of the marriage in the same way as the record, or the certificate of it, is received. Says Judge Swift, writing of the law of Connecticut: "Courts have permitted marriages to be evidenced by the certificate of the magistrate or minister who performed the ceremony. On principle it should be under oath and not by certificate; but we have experienced no inconvenience from the practice, and it has continued so long that it seems to have become common law." [3] The certificate of a magistrate in Maine seems to have been, in one case, deemed of itself sufficient as proof of whatever the record could establish, and the

[1] Nokes *v.* Milward, supra, p. 391.

[2] Wheeler *v.* McWilliams, 2 U. C. Q. B. 77, 80.

[3] Swift Ev. 5.

court observed that it was in the usual form.[1] This kind of evidence has been more or less received,[2] and perhaps in trials before single judges more or less rejected, in Massachusetts;[3] and in New Hampshire[4] and Virginia[5] there are statutes expressly authorizing its reception; and so, at least in certain cases, in Tennessee, if the certificate is accompanied by a certified copy of the marriage license.[6] On the other hand, such evidence is, in Pennsylvania, deemed inadmissible;[7] and probably also in various other States.[8]

IV. *How of Private Memoranda in the Nature of Records.*

§ 473 *a*. **General View.** — The reader, who has carefully examined the discussions under the foregoing sub-titles of this chapter, has observed that more or less reference is there made to *quasi* records, receivable in some circumstances and for some purposes as private memoranda, though not as records in the ordinary sense. And this sub-title is inserted simply to give such caution to the reader that he will not overlook the topic, though not to discuss it in full. The books are not quite clear and uniform in their utterances relating to it. The reporter's head-note to a late case before the Supreme Court of the United States is as follows: "Independently of statute requiring it to be kept, a baptismal register of a church, in which entries of baptisms are made in the ordinary course of the clergyman's business, is admissible to prove the *fact* and *date* of baptism, but not to prove other facts, as, for

[1] Wedgwood's Case, 8 Greenl. 75. See ante, § 468; S. P. Jones *v.* Jones, 18 Maine, 308.

[2] Ellis *v.* Ellis, 11 Mass. 92; Mangue *v.* Mangue, 1 Mass. 240. In Commonwealth *v.* Morris, 1 Cush. 391, decided since Stats. 1840, c. 84, and 1841, c. 20 (Gen. Stats. c. 106, § 22), a certificate of a marriage in another State, and "not verified or proved," nor found in the custody of the defendant, was rejected. And see Commonwealth *v.* Littlejohn, 15 Mass. 163; Milford *v.* Worcester, 7 Mass. 48, 57.

[3] There is at present, in Massachusetts, the following statute, the effect of which, on the point discussed in the text, I shall not attempt to state: "The record of a marriage, made and kept as prescribed by law by the person before whom the marriage is solemnized, or by the clerk or registrar of any city or town, or a copy of such record duly certified, shall be received in all courts and places as presumptive evidence of such marriage." Gen. Stat. c. 106, § 21.

[4] The State *v.* Marvin, 35 N. H. 22.

[5] Moore *v.* Commonwealth, 9 Leigh, 639.

[6] Rice *v.* The State, 7 Humph. 14.

[7] Hill *v.* Hill, 8 Casey, 511.

[8] See People *v.* Lambert, 5 Mich. 349; Gaines *v.* Relf, 12 How. U. S. 472.

example, that the child was baptized as the *lawful* child of the parents, and hence to infer a marriage between them." And Wayne, J., observed: "The register was admissible upon the ground that the entries in it were made by the writer in the ordinary course of his business."[1] This general question is discussed with considerable learning by Gray, J., in a Massachusetts case wherein it is held, that the entry of a baptism, contemporaneously made by a Roman Catholic priest, in the discharge of his ecclesiastical duty, in his church records of baptisms, is competent evidence after his death, of the date of the baptism, if the book is produced from the proper custody; although the priest was not a sworn officer, and the book was not required by law to be kept. And it was deemed that the like rule would prevail if the book was kept by any other minister of religion, in accordance with the usages of his own denomination. If the priest had been alive when this record was tendered, it would not have been admissible.[2] But in the facts of the case decided by the United States Supreme Court, as just stated, the priest who made the record which was deemed to be admissible for certain purposes was alive, and he gave his deposition to another point in the same case.[3]

V. *Special Considerations as to Foreign Records.*

§ 474. **General View — How under Constitution of United States.** — As to the matter of proof by record, there may be a difference between marriages celebrated in sister States of our Union, and celebrated in strictly foreign countries. If Art. IV. § 1, of the United States Constitution, which provides, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," with the act of Congress made in pursuance of this provision,[4] applies to records of the kind we are now considering, — then, of course, the difference between inter-State marriage records and strictly foreign ones is palpable. And even if it does not apply, still, as appears in some of our earlier

[1] Blackburn *v.* Crawfords, 3 Wal. 175, 189.

[2] Kennedy *v.* Doyle, 10 Allen, 161.

[3] See, also, Hubbard *v.* Lees, Law Rep. 1 Ex. 255.

[4] See 1 Greenl. Ev. § 504–506.

sections,[1] the courts may perhaps relax somewhat the general rule when the record comes, not from a wholly foreign country, but from a sister State. On the general question, whether the Constitution of the United States, properly construed, embraces such a matter as these records, and, if it does, whether still the act of Congress reaches the case, it is not the purpose of the author to express, in these pages, any opinion. Of specific decision, we have not much to help us here.[2]

§ 475. **Foreign Law proved in Connection with Record — Not follow Foreign Rules of Evidence.** — There are, however, two propositions, connected with the proof alike of strictly foreign and of inter-State marriages, important to be borne in mind. The one is, that, where the record of a foreign marriage is tendered, it must be accompanied by evidence showing the foreign law under which the record is kept. This is to enable the court to see, not that the record would be evidence in the foreign country, but that it is such a record as, if kept in our own country, would be evidence with us.[3] The other proposition is, that, in the language of the judge ordinary in an English case, "We are not bound by the rules of evidence in foreign countries, we must be guided by our own rules;" consequently, though by the foreign law the record or the certificate of it would be admissible in the country where made, it will not be received in our country unless receivable on the principle already explained.[4] Therefore — for the matter stands the same, whether the record be of marriage, or another record of a similar kind — where, in Ohio, the defendant on a trial in ejectment offered the deposition of the town clerk of New Milford, Connecticut, to prove the correctness of a copy of a record of his own town, showing the time of the defendant's birth, the court required him to further show, that the record was kept under the authority of law.[5]

§ 476. **Continued.** — At the same time it is true, that there

[1] Ante, § 415, et al.

[2] See Niles *v.* Sprague, 13 Iowa, 198; People *v.* Lambert, 5 Mich. 349; Swift *v.* Fitzhugh, 9 Port. 39.

[3] Fergusson *v.* Clifford, 37 N. H. 86; Taylor's Succession, 15 La. An. 313; People *v.* Lambert, 5 Mich. 349. And see Swift *v.* Fitzhugh, 9 Port. 39; Stevens *v.* Bomar, 9 Humph. 546; Richmond *v.* Patterson, 3 Ohio, 368.

[4] Finlay *v.* Finlay, 31 Law J. Mat. Cas. 149; Caujolle *v.* Ferrie, 26 Barb. 177.

[5] Richmond *v.* Patterson, 3 Ohio, 368.

are cases in which this point was not taken, or not deemed one to be regarded. Thus, in a New York case, no such objection being interposed, a sworn copy of the record of the town of Stonington, Connecticut, was accepted as admissible on a question of pedigree, — perhaps there is a difference between a question of pedigree and one of marriage, — where, also, a ruling to this effect was not essential to the case.[1] So in Pennsylvania, a copy of the register of marriages, baptisms, and burials, kept in a parish of the Island of Barbadoes, certified by the rector of the parish to be a true copy, and proved by the oath of a witness taken before the deputy secretary of the island and notary public (his handwriting and office being proved), under his hand and notarial seal of office, was held to be good evidence in proof of pedigree. There was no further proof of the foreign law, nor was any objection made to the want of such proof.[2]

§ 477. **Continued — Divorce.** — In an English *nisi prius* case, before Lord Kenyon, where the defendant, to prove a Jewish *divorce* at Leghorn, produced an instrument under the seal of the synagogue there, whereby the woman was declared divorced from her husband, his lordship refused to admit it, unless accompanied by proof of the foreign law. But he permitted the divorced woman herself to take the stand as a witness; and she swore, without producing any instrument of divorce, that she was divorced from her husband at Leghorn, according to the ceremony and custom of the Jews there; whereupon a verdict was rendered in favor of the party producing this evidence.[3] There may be some doubt, whether, as proof of divorce, in distinction from marriage, the course which this case took before his lordship is in all respects the same which would be deemed correct, in a like case, in the United States. But this matter of foreign divorce will be considered in another part of these volumes.[4]

§ 478. **Continued — English Rule.** — Mr. Taylor, in his book

[1] Jackson *v.* Boneham, 15 Johns. 226.

[2] Kingston *v.* Lesley, 10 S. & R. 383. But see Cood *v.* Cood, 1 Curt. Ec. 755, 6 Eng. Ec. 452. See Commonwealth *v.* Morris, 1 Cush. 391.

[3] Ganer *v.* Lanesborough, Peake, 17.

[4] And see Streeter *v.* Streeter, 43 Ill. 155; Commonwealth *v.* Boyer, 7 Allen, 306; post, § 514 et seq.

of Evidence,[1] states the English rule with regard to foreign and colonial registers, as follows: "Copies of such registers will be admissible, only on proof that they are required to be kept, either by the law of the country to which they belong,[2] or the law of this country. In the absence of such proof, a copy of a baptismal register in Guernsey,[3] — a copy of a certificate of baptism by the chaplain of a British minister at a foreign court,[4] — a copy of a marriage register kept in the Swedish embassador's chapel at Paris,[5] — and a copy of the book kept at the British embassador's hotel in Paris, wherein the embassador's chaplain had made and subscribed entries of all marriages celebrated by him,[6] — have been rejected. But on the other hand, an examined copy of a marriage register in Barbadoes has been admitted, it appearing that by the law of that colony such register was kept."[7] As shedding, perhaps, some further light on this question, the reader who is bent on investigating it thoroughly may not unprofitably open the books where are reported some other cases, here cited in a note.[8]

VI. *What Ancillary Proof must attend the Record?*

§ 479. **What the Record proves — Identity of Parties.** — The marriage certificate, or record, or certificate of record, as the case may be, whether it be of a foreign or of a domestic marriage, is not, in itself alone, sufficient evidence of the marriage. It proves only what it purports; namely, that two persons bearing the names mentioned therein were married on the day therein stated. Consequently the identity of the persons thus named with the parties whose marriage is in question, must be

[1] 2 Taylor Ev. 3d ed. § 1431.

[2] See Perth Peerage Case, 2 H. L. Cas. 865, 873, 874, 876, 877.

[3] Huet *v.* Le Messurier, 1 Cox, 275, commented on by Dr. Lushington in Cood *v.* Cood, 1 Curt Ec. 755, 766.

[4] Dufferin Peerage Case, 2 H. L. Cas. 47.

[5] Leader *v.* Barry, 1 Esp. 353.

[6] Athlone Peerage Case, 8 Cl. & F. 262.

[7] Cood *v.* Cood, 1 Curt. Ec. 755, 766, 767.

[8] United States *v.* Mitchel, 3 Wash. C. C. 95; Baner *v.* Day, 3 Wash. C. C. 243; Conway *v.* Beazley, 3 Hag. Ec. 639, 5 Eng. Ec. 242, 248; Hyam *v.* Edwards, 1 Dall. 1; Weston *v.* Stammers, 1 Dall. 2; Bingham *v.* Cabbot, 3 Dall. 19; Commonwealth *v.* Morris, 1 Cush. 391; Chouteau *v.* Chevalier, 1 Misso. 343; Hyam *v.* Edwards, 1 Dall. 1; Ennis *v.* Smith, 14 How. U. S. 400; Nokes *v.* Milward, 2 Add. Ec. 386, 2 Eng. Ec. 356.

established by other evidence.[1] The proof of identity need not, however, in any case, be by persons who were present at the marriage, or by the subscribing witnesses to the marriage register; but it may be made to appear by circumstantial evidence, without showing any inability to procure the direct proof. And there is no difference, as to this point, between actions for criminal conversations, or indictments for polygamy and the like, and ordinary civil actions. "As to the proof of identity," said Lord Mansfield, "whatever is sufficient to satisfy a jury is good evidence. If neither the minister, nor the clerk, nor any of the subscribing witnesses were acquainted with the married couple, in such a case none of them might be able to prove the identity. But it may be proved in a thousand other ways. Suppose the bell-ringers were called and proved that they rung the bells, and came immediately after the marriage and were paid by the parties; suppose the handwriting of the parties were proved; suppose persons called who were present at the wedding-dinner, &c., &c." And Buller, J., in the same case, said: "In this case, the wife's maiden name was Harriet Champneys. Suppose a maid-servant had proved that she always went by that name till the day of the marriage, that she went out that day, and on her return and ever since was called Mrs. Birt? Surely that would have been evidence of the identity."[2]

§ 480. **Identity, continued — Confessions.** — On the trial of an indictment for polygamy before the Recorder of New York, a clergyman having testified that he celebrated a marriage between parties of the names alleged in the indictment, but he did not know whether the defendant was the same woman or not, the court seemed to be of the opinion, that, if confessions of marriage could not be received in this issue to establish the fact itself, so neither could they help out the matter of identity. "Her acknowledgment," it was observed, "that she was the wife of Steers, would not show that she was the same person

[1] Wedgwood's Case, 8 Greenl. 75; The State *v.* Wallace, 9 N. H. 515; The State *v.* Winkley, 14 N. H 480, 494; Northfield *v.* Plymouth, 20 Vt. 582, 589; Commonwealth *v.* Norcross, 9 Mass. 492; Reg. *v.* Hawes, 1 Den. C. C. 270.

[2] Birt *v.* Barlow, 1 Doug. 171, 174, 175; Hemmings *v.* Smith, 4 Doug. 33; Damon's Case, 6 Greenl. 148; Cood *v.* Cood, 1 Curt. 755, 6 Eng. Ec. 452.

named by Dr. Knypers, as related in his testimony."[1] Still, assuming mere confessions of marriage not to be sufficient evidence in a case like this, — a point to be considered in another place,[2] — it is difficult to see why this evidence might not have gone to the jury, in aid of the general proofs of identity, though perhaps it would not alone be sufficient. Where, in a case of pedigree, a marriage in fact is proved to have taken place at so distant a period as to render proof of the identity of the parties next to impossible, the identity may be presumed.[3]

§ 481. **Continued — Discrepancy in Names.** — If, on an indictment for polygamy, there is a discrepancy between the Christian name of the prisoner's first wife, as laid in the indictment, and as stated in the copy of the certificate which is produced to prove the first marriage, the prisoner must be acquitted; unless the discrepancy can be explained, or, in the absence of explanatory proof, it can be shown that the first wife was known by both names.[4]

CHAPTER XXVI.

FURTHER AS TO THE PROOF OF WHAT IS CALLED A FACT OF MARRIAGE.

§ 482. **What a Fact of Marriage — When to be proved.** — When the proof of a marriage is by the record, with ancillary evidence to show the identity of the parties, as explained in the last chapter, there is established what the books speak of as a

[1] Steers's Case, 2 N. Y. City Hall Rec. 111.

[2] Post, § 497–502.

[3] Maule *v.* Mounsey, 1 Robertson, 40, 46.

[4] Reg. *v.* Gooding, Car. & M. 297. And see ante, § 469.

fact of marriage, in distinction from a marriage made to appear by cohabitation, reputation, and other like things resting on the presumption of innocence. Now, the books tell us that this fact of marriage must be established in evidence when the cause is an action for criminal conversation, or an indictment for polygamy, or the like. But if the party chooses, he can, in all other issues, prove the fact of marriage, instead of relying upon presumptions.

§ 483. **Record or Certificate unnecessary.** — There is a Massachusetts case, wherein it became necessary for the plaintiff to prove himself to be a doctor of medicine; and the court held, that he need not produce his diploma, but might rely on the vote passed for conferring the degree upon him. The vote was, "that the honorary degree of doctor of medicine be conferred," and so on. Said Shaw, C. J.: "When an aggregate body is authorized to make an appointment or grant an authority or privilege, and no mode is specially directed in which it shall be done, or by which it shall be proved, a vote that the act be done, or the right granted, is an execution of the power; and a duly authenticated copy of the vote sufficient proof of it."[1] Now, a marriage is not a degree of M. D., still, it is, among other things, a grant of an "authority or privilege," not indeed from the clergyman, but from the community, to the married parties. At all events, neither the certificate of marriage nor the record of it is essential either to the constitution of the marital relation, or to the establishment of the relation in proof. Marriage registers and certificates have the effect only to facilitate the evidence; they do not, in any issue whatever, preclude the party from producing other evidence, to the disregard of this, or as auxiliary to this. It is always competent even to withhold the record proof if the party chooses.[2]

§ 484. **What for this Chapter — How divided.** — One mode of proving a fact of marriage — namely, by the record — was

[1] Wright *v.* Lanckton, 19 Pick. 288, 290.

[2] Birt *v.* Barlow, 1 Doug. 171; Rex *v.* Allison, Russ. & Ry. 109; The State *v.* Marvin, 35 N. H. 22; Jackson *v.* People, 2 Scam. 231; Sayer *v.* Glossop, 2 Car. & K. 694, 12 Jur. 465; Doyly's Case, McQueen H. L. Pract. 654; Trower's Case, McQueen H. L. Pract. 656. See Woods *v.* Woods, 2 Curt. Ec. 516, 7 Eng. Ec. 181, 184; Northey *v.* Cock, 2 Add. Ec. 294, 2 Eng. Ec. 312.

explained in the last chapter; there remain, for this chapter, the following heads: namely, I. A General View of this Idea of Marriage in Fact; II. Circumstantial Evidence in Proof of this Marriage; III. Direct Evidence other than by the Record; IV. The Confessions and Admissions of the Party.

I. *General View of the Marriage in Fact.*

§ 485. **Inaccurate Language — "Marriage in Fact" — "Actual Marriage."** — The general language of the books is not well adapted to convey the idea really meant by the law. It is, that, in all causes, except, and so on, as already explained, proof of marriage by cohabitation and repute is sufficient; while, in the excepted cases, such as indictments for polygamy and the like, there must be proof of a *marriage in fact*, otherwise termed an *actual marriage*. Now, all marriages are marriages in fact; they are all actual marriages; and what is a good marriage in one case is good in another. The real point truly stated is, that an actual marriage in fact will be inferred from the cohabitation of parties as husband and wife, with perhaps the added reputation of their being married attending as the shadow upon such cohabitation, in all cases where this result, resting on the presumption of their innocence, does not come in conflict with the opposite result which might be derived from the like presumed innocence of the parties or of third persons, when all the facts are taken into the account.

§ 486. **"Marriage in Fact," &c. continued.** — In a New Hampshire case, the court undertook to define the terms actual marriage, and fact of marriage; and the conclusion arrived at was, that they had not been before defined, yet that they are practically used to denote the marriage as proved by *direct* evidence — as, for instance, by the testimony of witnesses who were present at the ceremony — in distinction from the proof by *indirect* evidence, such as reputation, cohabitation, acknowledgment, and the like.[1] In other words, it was that, where the evidence is circumstantial, there is, in the language of the law, proof of a marriage other than a marriage in fact; other, also, than an actual marriage: yet, where the evidence is not circumstantial, but direct, the marriage proved is a marriage

[1] The State *v.* Winkley, 14 N. H. 480, 494, 495.

in fact, or an actual marriage. It is of little consequence to ascertain with what degree of precision, or lack of precision, the judges heretofore have been in the habit of using the words composing our language; what we, who are inquiring to know the law, need most to determine is, — What is the substance — what the essence — of the law as held in actual adjudication? At the same time a more extensive search into the books would have shown, that these terms have at least sometimes been used by the most accomplished judges to denote marriages proved by other than direct testimony. Thus, Sir John Nicholl, in speaking of a marriage, the proof of which was circumstantial, said: "Now it appears to me that this evidence does sufficiently establish *a fact of marriage*."[1] And though the books show considerable confusion in language attributed to learned judges, yet, as the writer reads the cases, the result is, that, on the whole, the terms actual marriage and fact of marriage are synonymous in meaning, as employed in legal opinions, and either term signifies *such a marriage as in proof is established without help from the presumption of innocence.*

II. *Circumstantial Evidence in Proof of the Fact of Marriage.*

§ 487. **General Doctrine — Proof by Record.** — Therefore this which we have called a fact of marriage may, like any other fact arising in a judicial proceeding, be established by circumstantial as well as by direct evidence. It is a familiar truth, that a judgment can be proved only by an exemplification of the record; yet we have already seen, that the record of marriage is not in this respect in the nature of a judgment; but that the marriage, though recorded, is provable as well without reference to the record as with it, provided the party has proof by the lips of witnesses.[2]

§ 488. **Illustration of Circumstantial Proof.** — Thus, Dr. Radcliff, in giving judgment in the Consistory Court of Dublin, in a case where proof of the direct fact of marriage appears to have been considered necessary, remarked: "It therefore lay on the promovent here to allege and prove a marriage in fact;

[1] Steadman *v.* Powell, 1 Add. Ec. 58, 63, 2 Eng. Ec. 26, 29. And see Matter of Taylor, 9 Paige, 611; People *v.* Whigham, 1 Whecler, C. C. 115.

[2] Ante, § 483.

for a *de facto* marriage being once proved, it lies on the party denying it to prove its illegality. The law of Ireland imposing no statutable forms or ceremonies in order to a marriage, it is not essential to prove the fact of marriage by direct evidence to the point; it is sufficient to prove it circumstantially; and strict proof is not to be expected in a country where marriage registries are generally disregarded, and the law is so loose; and greater allowance is to be made in the proof of a marriage shown to be purposely and necessarily clandestine and secret.[1] In the present case, if a marriage took place, the whole evidence, from the beginning to the end, demonstrates that it must have been intended so to effect it as to keep it undivulged, so as not to reach the ears of Mr. Maxwell the elder, who, it was known, would not have consented to the marriage of his only son to any lady devoid of fortune. It is also a circumstance here, creating the impossibility of direct proof, that the Rev. Joseph Wood died suddenly, before the commencement of the suit, and that being what is styled a couple-beggar, his certificate, or entry of the marriage in his book, is not legal evidence." And in this case the marriage in fact was held to be established on evidence of public acknowledgment, by the husband, of the lady as his wife; and of her general high character; and of his admissions of promise to marry, and an attempt to fulfil the promise; though he denied the celebration.[2]

§ 489. **Another Illustration.** — So on a petition for divorce, in which, though the ground of the petition does not appear in the report, it was no doubt deemed necessary to prove a fact of marriage, as the term is defined in these pages, the court admitted proof by reputation, accompanied by evidence of the death of the magistrate before whom the marriage was reputed to have been solemnized; together with evidence of search made

[1] The reader will see, in another place, that, whether a clandestine or secret marriage shall require stronger or less strong proof than one which is not so, must depend upon circumstances. See post, § 539.

[2] Maxwell *v.* Maxwell, Milw. 290, 292, 293. The learned judge considered the law of marriage, under which this decision was given, to require, as essential to its validity, "a contract by words of the present tense between parties able to contract, with the intervention of a priest in orders." See also s. P. with the text, Else *v.* Else, Milw. 146, 150, relying upon Steadman *v.* Powell, 1 Add. Ec. 58, 2 Eng. Ec. 26. We have seen (ante, § 275 et seq.), that the case of Reg. *v.* Millis settled this point the other way.

in the records of the town for a record of this marriage, and no such record found.[1] But the particular proofs required in divorce causes is matter to be inquired into in another part of these volumes, not here.[2]

§ 490. **Morris *v.* Miller — Burrow's Reports.** — The cases and dicta which seem to favor the opinion, that what we have described to be a marriage in fact cannot be proved by circumstantial evidence, seem to have grown out of a misapprehension of the leading case on the subject; namely, Morris *v.* Miller.[3] This case was reported by Burrow from notes taken, not in short-hand, but in the ordinary hand which would not permit him, had he desired, to transcribe the exact language of the judge; while he, like the other reporters of his day, did not strive to do this. He was a clerk of the court, and the merit of his work, he said in the preface, "consists in the correctness of the *states* of the cases." And after saying that he did not use short-hand, he added: "I do not always take down the *restrictions* with which a speaker may *qualify* a proposition to guard against its being understood universally, or in too large a sense. And therefore I caution the reader" — but many readers would not take the caution — "always to *imply* the exceptions which ought to be made, when I repeat such propositions as falling from the judges. I watch the *sense*, rather than the *words;* and therefore may often use some of my own."[4] Looking after the sense and carrying this caution with us, we find, that, in the report by Burrow of this case, there appears to have been an action brought for criminal conversation with the plaintiff's wife, against a defendant who did not know except as matter of opinion whether the alleged wife was married or not. There was a confession by the defendant, who mentioned her as the plaintiff's wife. This evidence was deemed not to be sufficient; and plainly it was not, for the defendant did not profess to know the fact about which he spake.[5] Then, as observed by one of the counsel, "we proved articles between the man and his wife, made after the marriage, for the settling

[1] Mitchell *v.* Mitchell, 11 Vt. 134. And see Macqueen H. L. Pract. 535; Hervey *v.* Hervey, 2 W. Bl. 877; Bodkin *v.* Case, Milw. 355, 361.

[2] Vol. II. § 262–276.

[3] Morris *v.* Miller, 4 Bur. 2057, 1 W. Bl. 632.

[4] Burrow's Reports, Pref.

[5] See post, § 498.

of the wife's estate, with the privity of relatives on both sides." But as this marriage was celebrated, if at all, after statutes had made certain formalities necessary to the constitution of marriage, this was, perhaps correctly, deemed insufficient evidence. "We proved," continued the counsel, "*cohabitation*, *name*, *and reception* of her by everybody *as* his *wife*; though we did not indeed prove it by any register, or by witnesses who were present at the marriage." Now, Burrow gives us no clew to the answer which the judges made to any of the points except this last-mentioned one.

§ 491. **Continued — W. Blackstone's Reports.** — Says the report: "Lord Mansfield delivered the opinion of the court. We are all clearly of opinion, that, in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage *in fact:* acknowledgment, cohabitation, and reputation are *not sufficient* to maintain this action. But we do not at present define *what* may or may not *be evidence* of a marriage in fact. This is a sort of criminal action [Did his lordship here go into the argument, as the author of these pages has done in a previous chapter, and show how two presumptions of innocence arise, and one neutralizes the other? No man, now living, knows]; there is no other way of punishing this crime, at *common* law. It shall not depend upon the mere reputation of a marriage, which arises from the conduct, or declarations, of the plaintiff himself. In prosecutions for bigamy, a marriage in fact must be proved. No inconvenience can happen by *this* determination: but inconvenience might arise from a *contrary* determination; which might render persons liable to actions founded upon evidence made by the persons themselves who should bring the action." And these propositions are separated in the report into paragraphs, no one paragraph containing any thing more than is embraced within a single sentence; showing, almost conclusively, that the reporter, who supposed the readers of his reports would read his preface, meant to be understood as conveying only heads of the thought which fell from the judges.[1] The report of this case

[1] Morris *v.* Miller, 4 Bur. 2057, 2059. And compare these observations with observations from the same judge, reported in the like concise way, in Birt *v.* Barlow, 1 Doug. 170; Hemmings *v.* Smith, 4 Doug. 33.

by Sir William Blackstone, the author of the Commentaries, did not appear until, fourteen years after the opinion was pronounced, his two volumes of Reports were published as a posthumous work. There is great diversity, in point of correctness and authority, in the reports of the earlier and later times embraced in these two volumes. This particular case belongs to the class which were noted by him, sitting in court, in the full maturity of his powers, after he had written the work which made his name immortal. According to his report, it was "*per* Lord Mansfield, Chief Justice, and *tot. cur.*" adjudged: "In these actions, there must be proof of a marriage in fact, as contrasted to cohabitation, and reputation of marriage arising from thence. Perhaps there need not be strict proof from the register, or by a person present; but strong evidence must be had of the fact; as by a person present at the wedding-dinner, if the register be burnt, and the parson and clerk are dead. This action is by way of punishment: therefore the court never interfere, as to the quantum of damages. No proof, in such a case, shall arise from the parties' own act of cohabitation. The case of bigamy is stronger than this. And on an indictment for that offence, Dennison, Justice, on the Norfolk circuit ruled, that, though a lawful canonical marriage need not be proved, yet a marriage in fact (whether regular or not) must be shown. Except in these two cases, I know of none where reputation is not a good proof of marriage." This report is, like Burrow's, much divided into paragraphs, and evidently it was not intended to embrace all which the judges said.[1]

§ 492. **Continued.** — There are, in our reports, some cases to be found wherein judges have deemed, that, by force of some technical rule of the common law, as drawn from this case of Morris *v.* Miller, marriage is provable in actions for criminal conversation, and in indictments for polygamy, only by such direct testimony as could but occasionally be obtained for other ordinary matters resting in parol. Whether, according to the better view, the evidence in Morris *v.* Miller should not have been held, in matter of law, sufficiently to establish a fact of marriage, under the statutory regulations of the English law as it then stood, the jury choosing to draw this inference of fact from

[1] Morris *v.* Miller, 1 W. Bl. 632.

it, is a point of evidence which we need not pause here to examine; for surely no one decision of a judge, or a bench of judges, on a question of the sufficiency of evidence, should bar all future times. But in those States, in this country, wherein marriages may be contracted without the formalities required by the English marriage acts, plainly this evidence ought to be deemed sufficient, in a like case. And plainly the mere dictum of a judge, however exalted, even if we had the dictum, ought not to be received to overturn principles of law resting in the very foundations of our jurisprudence, and sanctioned by the usages of all time. But we have seen, that, in Morris *v.* Miller, we have not certainly even the dictum. And plainly if we take Blackstone's report of the case as containing the better statement of the doctrine which fell from the judges, and Burrow's report as embracing the better statement of the case, we have nothing here which need demand of us the casting aside of our reason and the upturning of otherwise established legal principles.

§ 493. **Conclusion as to the General Doctrine.** — Let us accept it as law, therefore, that the fact of marriage, like other facts, may be proved by circumstantial evidence, where such evidence is the best which is within the power of the party upon whom lies the burden to establish the fact. Yet a case may be of such a nature that, upon the face of things, the party has direct evidence, if what he asserts is really true, and then the court will do wisely to require him to produce such evidence. Thus, on the trial of an indictment for lascivious cohabitation, one of the parties being, it was alleged, married to a third person, there having been proof that, about twelve years before, such party and such third person left the house of the witness for the declared purpose of going to the house of a clergyman about two miles distant to be married by him; that, after an absence during which a marriage might have been performed, they returned declaring themselves married; and that they lived together as husband and wife until within a year, when the husband was committed to the State prison, — the court said, the record of the clergyman should be produced, or else the testimony of witnesses who were present.[1] This case may per-

[1] Commonwealth *v.* Littlejohn, 15 Mass. 163.

haps have carried the doctrine too far; but, at least, it will illustrate a principle.[1]

III. *Direct Evidence other than by the Record.*

§ 494. **Clergyman as Witness. —Third Person Present.** — The fact of marriage may be proved by the clergyman or other official person who solemnized it;[2] yet there is no legal necessity for calling such officiating person.[3] Any one who was present at the marriage may be a witness to prove the fact.[4] Where there is no incompetency by reason of being interested, or being parties to the record, or the like, the married persons may themselves be called to witness either for or against their own alleged marriage.[5] There are, however, several circumstances in which, by operation of the general rules of evidence, the testimony of these persons will be excluded; yet it does not come within the purpose of these volumes to discuss them.[6] This is the usual direct proof of the fact where the record is not produced, but there may be other admissible evidence of a like nature. Proof by witnesses present has been deemed better than proof by the record.[7]

§ 495. **Official Character of Clergyman, &c.** — Where the marriage is proved by the testimony of a person who was present, it has been made a question to what extent proof must also be presented of the official character of the person who solemnized it; as, that he was a magistrate, or a minister of the gospel. It is not essential to the entire validity of the marriage, that such person be a magistrate or minister *de jure;* if he is such *de facto*, that is enough; and perhaps, also, if he is a mere usurper.[8]

[1] See, also, Langtry *v.* The State, 30 Ala. 536.

[2] People *v.* Wigham, 1 Wheeler, C. C. 115.

[3] Coleman's Case, 6 N. Y. City Hall Rec. 3.

[4] Nixon *v.* Brown, 4 Blackf. 157; The State *v.* Williams, 20 Iowa, 98; Patterson *v.* Gaines, 6 How. U. S. 550, 589; Bruce *v.* Burke, 2 Add. Ec. 471, 2 Eng. Ec. 381, 383; St. Devereux *v.* Much Dew Church, Bur. Set. Cas. 506, 1 W. Bl. 367; The State *v.* Robbins, 6 Ire. 23.

[5] 1 Greenl. Ev. § 342; Allen *v.* Hall, 2 Nott & McC. 114; The State *v.* Wilson, 22 Iowa, 364; Kilburn *v.* Mullen, 22 Iowa, 498; Guardians of the Poor *v.* Nathans, 2 Brews. 149; Christy *v.* Clarke, 45 Barb. 529.

[6] Rose *v.* Niles, 1 Abbot Adm. 411; Scherpf *v.* Szadeczky, 4 Smith, N. Y. C. P. 110; Poultney *v.* Fairhaven, Brayt. 185; Reg. *v.* Madden, 14 U. C. Q. B. 588.

[7] Commonwealth *v.* Norcross, 9 Mass. 492; Warner *v.* Commonwealth, 2 Va. Cas. 95.

[8] The Lord Chancellor and Lord Cottenham in Reg. *v.* Millis, 10 Cl. &

Therefore it is not necessary to produce his commission, or any record or other like evidence of his authority; the usual proof in such cases being, that he was in the habit of acting, or had acted, in this capacity.[1] The doubt is, whether the person must be shown to have acted in more cases than the single one in controversy. It would seem clear upon principle that no other proof need, in the first instance, be produced; because the law, which always presumes innocence, will presume that the person who solemnized the marriage under a claim of authority had such in fact, since otherwise he would expose himself to the penalties of the law;[2] because, also, where a purpose of present marriage is shown, every legal intendment is in favor of the validity of the marriage;[3] and because, in cases where the proof is offered against one of the parties to the ceremony, such party's own admission of the official character of the person performing it is necessarily embraced in the proof.[4]

§ 496. **Continued.** — And this doctrine seems not entirely without authority,[5] though it has happened, in most of the cases, that there has been some accompanying badge of office; as, that the person officiating was habited as a priest.[6] On the other hand, in Maine, on the trial of an indictment for adultery, the witness having testified that she saw the ceremony performed, but could not tell by whom, and gave no description of the person performing it whereby his official character could be indicated, the evidence was held to be insufficient, though the performance of the ceremony was followed by cohabitation.[7] Perhaps the tendency of the authorities may be to require something beyond the mere performance of the ceremony indicative of the official character.[8] But it will be difficult to sus-

F. 534, 861, 906; Hawke *v.* Corri, 2 Hag. Con. 280, 283. See Dormer *v.* Williams, 1 Curt. Ec. 870, 6 Eng. Ec. 505.

[1] The State *v.* Robbins, 6 Ire. 23; Warner *v.* Commonwealth, 2 Va. Cas. 95; The State *v.* Kean, 10 N. H. 347; The State *v.* Winkley, 14 N. H. 480; Damon's Case, 6 Greenl. 148; Legeyt *v.* O'Brien, Milw. 325; Goshen *v.* Stonington, 4 Conn. 209; The State *v.* Abbey, 29 Vt. 60.

[2] Ante, § 450, 451.

[3] Ante, § 457.

[4] Warner *v.* Commonwealth, 2 Va. Cas. 95.

[5] The State *v.* Rood, 12 Vt. 396; Goshen *v.* Stonington, 4 Conn. 209; The State *v.* Winkley, 14 N. H. 480, 496.

[6] Rex *v.* Brampton, 10 East, 282, 291; Fielding's Case, 14 Howell St. Tr. 1327; Patterson *v.* Gaines, 6 How. U. S. 550; The State *v.* Rood, 12 Vt. 396.

[7] The State *v.* Hodgskins, 19 Maine, 155.

[8] According to a Delaware case, in

tain such a distinction. If we assume it to be settled, that, where a person entirely unknown to the witness, *habited like a priest*, performs the ceremony, no further evidence is required of his being a priest, it seems necessarily to follow, that, if a person professing to be a justice of the peace or a Protestant dissenting minister performs the ceremony, in the proper apparel of such minister or justice, he must likewise be presumed to have authority, though the apparel be but the common dress worn in the community, without any mark of distinction. Should the law presume, that a third person would usurp an office to perform a ceremony through fraud, it might also and as well presume that the same person would, when essential to the accomplishment of the object, tie on a ribbon, or put on a gown, before performing the ceremony. The reader will observe, that what is here laid down relates to the law of those States in which a formal solemnization of marriage is essential to its validity. If, in the other States, a formal solemnization is shown, it is plainly immaterial whether the person officiating had authority or not. And in the former class of States, some of the statutes expressly make it sufficient that the person officiating was believed by the parties to have authority.

IV. *The Confessions and Admissions of the Party.*

§ 497. **Admissible — General Doctrine.** — It is obvious that no witness, especially no non-professional one, can better know whether a fact of marriage has transpired between parties, than themselves. Therefore a deliberate admission or confession of such a fact, be it to a marriage at home or in a foreign country, is competent evidence against the party.[1] There is, indeed,

an action to recover a widow's interest in the one-third of the personal property of an intestate husband, the authority of the minister who performed the marriage cannot be proved by general reputation; but it is sufficiently shown by evidence, that he was received as a regularly ordained minister of the gospel by a Methodist church where he was sent by the conference, and where he officiated at the sacrament and other ordinances for two years, and that he then went to another circuit. Pettyjohn *v.* Pettyjohn, 1 Houston, 332.

[1] Reg. *v.* Simmonsto, 1 Car. & K. 164; Reg. *v.* Upton, 1 Car. & K. 165 note; Duchess of Kingston's Case, 20 Howell St. Tr. 355; Patterson *v.* Gaines, 6 How. U. S. 550; Truman's Case, 1 East, P. C. 470; Cayford's Case, 7 Greenl. 57; Ham's Case, 2 Fairf. 391; The State *v.* Hilton, 3 Rich. 434; The State *v.* Britton, 4 McCord, 256; Warner *v.* Commonwealth, 2 Va. Cas. 95; Norwood's Case, 1 East, P. C. 337,

some apparent and perhaps real authority,[1] adverse to this proposition as applied to cases of indictment for polygamy; and, indeed, there may be some of our States, as we shall see a little further on, where the law is the other way.

§ 498. **Discussed.** — As to civil actions for criminal conversation, we have seen, that, in Morris *v.* Miller, the judges deemed the confessions of the defendant, who was not a party to the marriage, or present at it, and who knew nothing about it, inconclusive.[2] Whether they were evidence which the court considered admissible for what it was worth in the case, the case as we have it reported seems not very distinctly to disclose. The Pennsylvania tribunal has admitted such confessions to the consideration of the jury; observing of the case of Morris *v.* Miller, which was not deemed to stand in the way of this decision: "That case, for every thing decided in it, is good authority; for nothing is more certain, than that, to support an action for criminal conversation, there must have been an actual marriage."[3] And plainly, in principle, wherever there is a confession by the defendant to the marriage of the plaintiff, in these actions for criminal conversation, the confession should be looked at, and such weight should be given it, as, under the circumstances, and considering it as coming from a man who may not know the fact about which he speaks, it is, in the eye of reason entitled to receive. And this is believed to be the true doctrine of the adjudged law. Two years after the case of Morris *v.* Miller was decided in the English Court of King's Bench, the same tribunal explained it, as concerns this point, in the following language: "As to the case mentioned of criminal conversation, to be sure a defendant's saying in jest, or in loose rambling talk, that he had laid with the plaintiff's wife, would not be sufficient alone to convict him in that

470; Commonwealth *v.* Murtagh, 1 Ashm. 272; Reg. *v.* Newton, 2 Moody & R. 503; Fornshill *v.* Murray, 1 Bland, 479, 482; Woods *v.* Woods, 2 Curt. Ec. 516, 7 Eng. Ec. 181, 183; Hill *v.* Hill, 8 Casey, 511; The State *v.* Libby, 44 Maine, 469; The State *v.* McDonald, 25 Misso. 176; Fuller *v.* Fuller, 17 Cal. 605; Cameron *v.* The State, 14 Ala. 546; Forney *v.* Hallacher, 8 S. & R. 159; Wolverton *v.* The State, 16 Ohio, 173; The State *v.* Seals, 16 Ind. 352. And see Kenyon *v.* Ashbridge, 11 Casey, 157.

[1] Reg. *v.* Flaherty, 2 Car. & K. 782; People *v.* Lambert, 5 Mich. 349; The State *v.* Timmens, 4 Minn. 325. And see post, § 499. See also Gaines *v.* Relf, 12 How. U. S. 472.

[2] Ante, § 490, 491.

[3] Forney *v.* Hallacher, 8 S. & R. 159, 160, opinion by Gibson, C. J.

action; but, if it were proved that the defendant had seriously or solemnly recognized that he knew the woman he had laid with was the plaintiff's wife, we think it would be evidence proper to be left to a jury, without proving the marriage."[1]

§ 499. **Not Admissible, or Insufficient.** — In Massachusetts,[2] previous to the enactment of a statute which has since corrected the error, also in Connecticut,[3] New York,[4] and Michigan,[5] the confessions of the prisoner have been held to be either inadmissible or insufficient evidence to prove the fact of marriage in indictments.[6] But said Parker, J., of New York: "It has not been decided in this State that confessions of the marriage are not admissible, but that they are insufficient to prove the fact. I do not see upon what principle they can be excluded, and, though insufficient of themselves to prove marriage, even when aided by proof of cohabitation and reputation, yet they may be important evidence, and I think they are in all cases competent." Accordingly, in the case in which these observations occur, the evidence of the confessions was admitted; but the verdict, rendered against the prisoner, was set aside because the evidence was too slight, though accompanied by proof of matrimonial cohabitation and reputation.[7]

§ 500. **Weight.** — The weight which the confession is to have, in the evidence, must depend altogether upon the circumstances of the case, and upon the particular nature of the confession. It may, under some circumstances, be worthy of very little if any regard; under others, if the confession was a serious one, it may itself be sufficient.[8] "Such acknowledgments," observes Mr. East, "made without consideration of

[1] Rigg *v.* Curgenven, 2 Wils. 395, 399. See also Fornshill *v.* Murray, 1 Bland, 479, 482; Warner *v.* Commonwealth, 2 Va. Cas. 95. And see, on the general matter of proving a marriage in these cases, Birt *v.* Barlow, 1 Doug. 171; Hemmings *v.* Smith, 4 Doug. 33; Catherwood *v.* Caslon, Car. & M. 431, 13 Law J. N. S. Exch. 334.

[2] Commonwealth *v.* Moffat, 2 Dane Ab. 296; Commonwealth *v.* Littlejohn, 15 Mass. 163.

[3] The State *v.* Roswell, 6 Conn. 446.

[4] People *v.* Humphrey, 7 Johns. 314; Steers's Case, 2 N. Y. City Hall Rec. 111.

[5] People *v.* Lambert, 5 Mich. 349.

[6] In Minnesota also, The State *v.* Timmens, 4 Minn. 325.

[7] Gahagan *v.* People, 1 Parker, 378. And see Coleman's Case, 6 N. Y. City Hall Rec. 3; Phelan's Case, 6 N. Y. City Hall Rec. 91.

[8] Commonwealth *v.* Murtagh, 1 Ashm. 272, 275; Wolverton *v.* The State, 16 Ohio, 173; Reg. *v.* Flaherty, 2 Car. & K. 782.

the consequences, and palpably for other purposes at the time, are scarcely deserving of that name in the sense in which acknowledgments are received as evidence; more especially if made [in cases of polygamy] before the second marriage, or upon occasions when in truth they cannot be said to be to the party's own prejudice, nor so conceived by him at the time." [1]

§ 501. **Continued — Further as to Admissibility.** — In Connecticut, where the confession was rejected by the majority of the court, Daggett, J., who delivered the majority opinion, said: "The cohabitation of persons as husband and wife, without any marriage, is too frequent to need comment; and confessions of marriage in all such cases, whether a marriage in fact has taken place or not, may be expected, to justify the conduct and screen the offenders from censure and punishment. Unlike confessions of facts in ordinary cases, made against one's interest, these are not unfrequently prompted from the most selfish motives. Besides, a man or woman may verily suppose a marriage to have been consummated, when no lawful marriage ever took place. Ignorance of the law on this subject may be presumed in many cases, and confessions of a marriage made without a knowledge of the requisites to constitute it such," [2] &c. — observations which show the importance of scrutinizing the confession, rather than rejecting it. Said Birchard, C. J., in an Ohio case: "It is true, that confessions of marriage may be made by persons living in a state of fornication, with a view to secure the offenders from public censure, and thus make a case unlike the ordinary cases of confession against one's interest. This, in our opinion, furnishes no reason for rejecting the evidence as incompetent. It shows rather that the confession thus made should not be relied on, and held by the jury, when unsupported, sufficient to work a conviction. In such a case, and indeed in all cases where the confession of a party is given in evidence, its force must depend upon the circumstances under which it is made." [3] But as to the point, that the party who made the confession may not understand the marriage law, it may be observed,

[1] 1 East, P. C. 471; Roscoe Crim. Ev. 278; Reg. *v.* Newton, 2 Moody & R. 503.

[2] The State *v.* Roswell, 6 Conn. 446, 451. And see West *v.* State, 1 Wis. 209.

[3] Wolverton *v.* The State, 16 Ohio, 173.

that the same is true of witnesses who testify to having seen the ceremony performed; yet, if the confession speaks only of the marriage in general terms, this consideration should have its weight with the jury.[1]

§ 502. **Token accompanying Confession — Conclusion.** — A confession may receive particular weight from its being accompanied by some outward token. For example, where, on an indictment for polygamy, there was, besides cohabitation proved with the first wife, evidence that the prisoner when making the confession backed his assertions by producing to the witness a copy of a proceeding against him in a Scotch court, the alleged first marriage having been in Scotland, for having improperly contracted the marriage, though the marriage was still good by the Scotch law, this was held to be a material circumstance strengthening the confession.[2] Let us, however, close this chapter in the words of a learned New Jersey judge: "In general," he said, "it may be observed, that all the rules of evidence depend upon the nature of the case and the facts which are to be proved; and the principles to be observed in admitting or rejecting testimony must, in some measure, be accommodated to the particular circumstances which are in issue, taking care, however, to adhere, as far as possible, to general rules of law."[3]

CHAPTER XXVII.

EFFECT ON THE PROOFS OF SHOWING AN ILLICIT COMMENCEMENT TO THE COHABITATION.

§ 503. **Diverse Kinds of Illicit Beginnings.** — It is plain, in reason, that, if the commencement of a cohabitation is shown to be illicit, and the question is whether a valid marriage was afterward celebrated, and the fact is to be inferred from cir-

[1] See Reg. *v.* Simmonsto, 1 Car. & K. 164.

[2] Truman's Case, 1 East, P. C. 470.

[3] Kinsey, C. J., in Peppinger *v.* Low, 1 Halst. 384. And see The State *v.* Libby, 44 Maine, 469.

cumstances, some different considerations enter into the inquiry from those which attend a case in which plainly the marriage took place, if at all, when the cohabitation began. Then, to look more minutely at the differing facts, there are diversities of result flowing from the diverse circumstances in which an illicit cohabitation may have originated. If the parties were ignorant of any existing impediment, and entered into a formal marriage, yet in truth there was an impediment, — if there was no impediment, yet they chose to indulge in an unlawful commerce under the cloak of a falsely-assumed matrimonial union, — if they entered into a notorious, openly acknowledged, meretricious relation, — if there was an impediment known to themselves, yet they really desired matrimony, and sought the removal of the impediment, — in each of these cases, the question, whether, after the impediment is gone, a marriage shall be presumed to have been had, will depend much upon the special nature of the particular case.

§ 504. **Under Diverse Marriage Laws.** — Again ; the question, in a State wherein marriages entered into without formal solemnization are good in law, differs from the question in a State where they are not. And this is a consideration pervading the whole law appertaining to the proof of marriage. Says Mr. Hubback: "All evidence must vary with the nature of the fact to be proved; and the fact under discussion changes with the formalities which by the law of the time and country were required in the construction of marriage; and the proof is further affected by the greater or less tendency of the attendant formalities to generate and preserve evidence of the transaction. For these reasons, the evidence of an English marriage which took place before Lord Hardwicke's act differs from that of one of a subsequent date. The possibility of the former having been contracted in a manner which should leave no written, and even no extrinsic oral evidence of the fact, makes it reasonable to allow its establishment by slighter circumstances than are requisite to prove a more recent marriage, of which the mode of celebration in all probability created evidence of a higher character." [1] These remarks, however, apply

[1] Hubback on Succession, 237. And see Steadman *v.* Powell, 1 Add. Ec. 58, 2 Eng. Ec. 26, 29; Northfield *v.* Plymouth, 20 Vt. 582.

chiefly, and in ordinary circumstances, to the sufficiency of the evidence, rather than to the particular proofs admissible;[1] for, as a general proposition, marriage may be, at least *prima facie*, shown by the same evidence under all the differing modes of solemnization. Therefore it is, that, in the foregoing chapters, little has been said concerning the differences of which mention has now been made.

§ 505. **How as to the Cases — Difficulties of the Subject.** — Though these observations convey truths most plain and palpable, it is still true that they have seldom been present in the minds of the judges when passing upon the class of questions to be discussed in this chapter. We shall, therefore, be obliged to feel our way here, as through a maze; and, if the writer ventures upon a suggestion now and then, he can only hope that it may receive the approbation of the courts; whether it will or not he cannot state, otherwise than by saying that so ought to be the decided law.

§ 506. **Where there is no Impediment to Lawful Marriage. — Impediment unknown.** — If parties come together, intending and choosing an illicit commerce, there being no impediment to marriage, or the impediment not being known, then, the fact of this choice having been established, we cannot infer a change of choice merely from the fact of their *not* changing their conduct. In other words, if they are shown to have chosen an illicit commerce, instead of matrimony, at a time when, as they understood the facts, there was no obstacle in the way of their intermarriage, they cannot be presumed by the law to have converted their unlawful connection into a lawful one, unless something more appears in the case than the mere continuance of the commerce which they chose, in the first instance, should be unlawful. From this plain proposition there has been drawn, by some judges, a somewhat doubtful general statement of the law; namely, that cohabitation, illicit in its commencement, is presumed to continue so. And the reason why the proposition thus laid down is doubtful is, not that it is not in some circumstances true, but that, as a matter of correct legal principle, it is true only in some circumstances, untrue in others. And indeed the judges generally lay down the proposition with

[1] Hubback on Succession, 288.

qualifications; and the cases in which the qualifications apply are probably more numerous than those wherein the unqualified proposition applies.[1]

§ 507. **Lapsley *v.* Grierson.** — The presumption to be derived from cohabitation illicit in its commencement, was much discussed in the case of Lapsley *v.* Grierson, decided in the House of Lords on an appeal from Scotland. The facts were, that a Scotchman married in Scotland and went abroad; his wife cohabited with another man without any knowledge of the death of her husband, or any reason to suppose him dead, and had children by this cohabitation, some of them born before, and some after the death of the husband. And it was held necessary for those who asserted the legitimacy of these children, the origin of the cohabitation of the parents being thus illegal, to show a change in the nature of it, after the death of the husband had become known to those parties. There being no evidence of such change, the children, even those who were born after the death of the husband, were held to be illegitimate. In giving judgment Lord Brougham said: "I was first a little hampered by the arguments of the Lord Advocate, and of Lord Cunninghame. If the death of William Paul (the first husband) was believed *bona fide* before the cohabitation, then the fact being contrary to their belief, the belief being groundless, but the cohabitation proceeding on that belief, if afterwards William Paul died, and the cohabitation continued, I might have had some difficulty in saying that this cohabitation, which was in fact illegal, but was founded on the *bona fide* belief of the death of the first husband, and of the character of man and wife being lawfully assumed by these parties, did not become licit by the death of Paul. [The reader will remember that this was a Scotch marriage, and that marriages in Scotland require no formal solemnization.] But when I come to look into the facts of the case, I do not think that I am at all called on to consider that question." Lord Campbell said: "That, no doubt, is a very important question, but it does not arise here; for it is clear to me that here neither of the parents did

[1] Cunninghams *v.* Cunninghams, 2 Dow, 482; Bond *v.* Bond, 2 Lee, 45, 6 Eng. Ec. 28; Taylor *v.* Taylor, 2 Lee, 274, 6 Eng. Ec. 124; Maxwell *v.* Maxwell, Milw. 290; Matter of Taylor, 9 Paige, 611, 615; Hyde *v.* Hyde, 3 Bradf. 509; Ferrie *v.* The Public Administrator, 4 Bradf. 28.

entertain that belief. There was *mala fides* from the beginning to the end of the proceeding."[1]

§ 507 *a*. **Continued — Campbell *v.* Campbell.** — In a subsequent case before the House of Lords on appeal from Scotland, this case of Lapsley *v.* Grierson and the leading case of Cunninghams *v.* Cunninghams cited to the section before[2] were brought under review, and doctrines were laid down which can hardly fail to command universal assent. A Scotchman eloped, in England, with another man's wife. From first to last he treated her as his wife, and she was received by his friends and believed by them to be such. Soon after the elopement the husband died. And, after this event, the parties lived together as husband and wife in Scotland, where no formal ceremony is required to constitute marriage, for thirteen years, until the man died, they during all this time holding themselves out and being reputed as married persons. And it was adjudged that here was sufficient from which a marriage, entered into after the death of the woman's husband, might as a fact be inferred. Said Lord Cranworth: "Where a man and woman have lived together as husband and wife, at a time when they could not be husband and wife, and where they continue to live together in the same manner after it has become possible for them to become husband and wife, the question whether they have become husband and wife is a question, not of law, but of fact. The law permits them to create that relation between themselves, and whether they have done so must be decided like any other question of fact. The circumstance that they represented themselves to be man and wife, when they knew they were not so, may reasonably be taken into account in estimating their subsequent conduct. It may neutralize the effect which would otherwise have been properly given to their subsequent cohabitation, that is, it may do so as matter of fact; I cannot think it must do so as matter of law; and, if that be so, then all which any tribunal can do which has to deal with such a question is, to look to all the circumstances of the case, and consider whether they do, or do not, lead to the conclusion that the par-

[1] Lapsley *v.* Grierson, 1 H. L. Cas. 498, 506. See also Cram *v.* Burnham, 5 Greenl. 213.

[2] See also, of this case, post, § 510.

ties did contract marriage at some time after it was possible for them to marry." Again: "The circumstance of his having introduced her as his wife during the life of Ludlow [the first husband], when she certainly was not his wife, does not lead me to any conclusion different from that at which I should have arrived if that had not been the case. I am not sure that it does not rather strengthen than weaken the presumption of actual marriage. It shows a strong desire that she should occupy a respectable position in society; and it is hard, therefore, to believe, that having had for above twenty-two years the daily opportunity of giving her the status which, even when she did not rightfully enjoy it, he was anxious to have it believed that she had acquired, he should not have profited by the law which put it in his power to confer it upon her." "There is no foundation," said Lord Westbury, "for the argument that the matrimonial consent must of necessity be referred to the commencement of the cohabitation, nor any warrant for the appellant's ingenious argument that, as the consent interchanged must be referred to some particular period, which he insisted was at the commencement of the cohabitation, and therefore insufficient, the cohabitation, which continued afterwards without interruption, would warrant no other conclusion than that which would be warranted by the consent interchanged at a time when it was insufficient. I should undoubtedly oppose to that another, and, I think, a sounder rule and principle of law, namely, that you must infer the consent to have been given at the first moment when you find the parties able to enter into the contract. The conclusion, therefore, that I derive, and which, unquestionably, is consistent with the language of the cases which have been referred to, is, that the consent between the parties was given, and that the marriage, therefore, in theory of law, took place, at the time when, by the death of the first husband, they became competent to enter into the contract." Again, speaking of the woman having represented untruly, as it appeared in the case, that a formal marriage had been celebrated at a time and place named, this learned person asked: "What moral conclusion, therefore, can you derive from that? This only, that they were most anxious to have the character of being husband and wife. How far,

therefore, does that operate upon the conclusion derived from their subsequent conduct? Why, it aids the inference that the subsequent cohabitation, when they became free to marry, was a cohabitation that necessarily involved that consent to become husband and wife, which it is plain they desired to become, even at that time, when there was a bar to their contracting a marriage." [1]

§ 508. **How in United States.** — The American decisions are not all found to be, on examination, so clear and satisfactory as one would desire; still, with us, juries have in some cases been permitted to infer a fact of marriage, celebrated after the death of the former matrimonial partner, though there was no direct proof of such fact, and even though there might be a strong probability that no such fact had really transpired.[2] Where, in one case, a woman had entered into a marriage with a man, believing her former husband to be dead, and, her supposed deceased husband returning, still continued to cohabit under the second marriage, and kept up this cohabitation for several years after her first husband really died, — a second marriage, after the death of the first husband, was presumed.[3] And in another case, where a married man, knowing his wife to be alive, entered into a form of marriage with another woman, who did not know of the impediment, and continued the cohabitation under this second marriage until after the death of the first wife, — a marriage after such death was inferred.[4] These and other like cases found in our books were, in part, if not all of them, decided in States where marriage may be contracted without any formal solemnization; and, in such States, the rule *ought* to be, — the writer regrets that he cannot refer to any case establishing the rule to be so in actual adjudication, — that, where the desire for actual, lawful marriage, as distinguished from a living together in the way of concubinage, is shown to exist in the minds of both the parties, and, such desire

[1] Campbell *v.* Campbell, Law Rep. 1 H. L. Sc. 182, 201, 204, 213, 215. See O'Gara *v.* Eisenlohr, 38 N. Y. 296.

[2] Fenton *v.* Reed, 4 Johns. 51; Rose *v.* Clark, 8 Paige, 574; Donnelly *v.* Donnelly, 8 B. Monr. 113; Jackson *v.* Claw, 18 Johns. 346; North *v.* North, 1 Barb. Ch. 241; Starr *v.* Peck, 1 Hill, N. Y. 270. And see Breakey *v.* Breakey, 2 U. C. Q. B. 349, 359; Hyde *v.* Hyde, 3 Bradf. 509; Ferrie *v.* The Public Administrator, 4 Bradf. 28.

[3] Fenton *v.* Reed, supra.

[4] Donnelly *v.* Donnelly, supra.

continuing, they are shown to dwell together as husband and wife but for a single day after the impediment is removed, — this shall be held, not merely as raising a *prima facie* presumption of marriage solemnized after the impediment is removed, but as constituting marriage itself.[1] Indeed, there are, in such circumstances, both the matrimonial consent and the actual dwelling together in marriage, and there is the legal capacity to intermarry: if these do not constitute matrimony itself, in distinction from the mere evidence of it, where no formal solemnization is required, it is difficult to say what does.

§ 509. **Continued. — Where the Law requires Formal Solemnization.** — Where certain formalities are made necessary, by a statute, to the entering into of a marriage, there the facts spoken of in our last section should be deemed only evidence of marriage, — they could not constitute the marriage itself. And there is an English case, decided by the Court of King's Bench at a time when sound law generally prevailed in the high English tribunals, illustrating, in a clear and forcible manner, some of these propositions. Minors were married; but, under the circumstances, it was impossible they should have had the consent of parents, without which the marriage, celebrated in the way it was, must have been void under the marriage act. When the young man became of age, his wife (for so she was afterward held to be) was lying *in extremis* on her death-bed, and she lived only three weeks. The jury, however, inferred a formal marriage celebrated during this period, under these circumstances, and the court refused to disturb the verdict. Lord Kenyon, C. J., said: "In the case of new trials, it is a general rule that in a hard action, where there is something on which the jury have raised a presumption agreeably to the justice of the case, the court will not interfere by granting a new trial, *where the objection does not lie in point of law*. [Therefore there was no rule of law violated in this finding by the jury.] . . . . In this case, though the first marriage was defective, a subsequent one might have taken place. . . . . If there were any ground of

[1] See Hicks *v.* Cochran, 4 Edw. 107; Northfield *v.* Plymouth, 20 Vt. 582, 591; Tummalty *v.* Tummalty, 3 Bradf. 369; Lapsley *v.* Grierson, 1 H. L. Cas. 498.

presumption, it is sufficient in a case like this. In this case the parties did not intend to elude the marriage act; but all their friends were fully informed of and concurred in this former marriage. And I think we should ill exercise the discretion vested in the court, if, after the jury had presumed a subsequent legal marriage under all the circumstances of this case, we were to set aside their verdict."[1] And this case bears a considerable resemblance to one referred to in another chapter, wherein the House of Lords inferred a marriage against very strong outside probabilities, in obedience to the rule of law, that all presumptions of law shall be drawn in to support the marriage, where marriage was the desire of the parties.[2]

§ 510. **Where Real Matrimony not desired.** — The reader observes, that, in these cases wherein marriage was inferred, there was greater or less evidence of the existence of a desire on the part of the persons who were living together as husband and wife, to be such in fact. But in a leading case which went before the House of Lords on an appeal from Scotland, there was no impediment to a marriage existing at the time when an illicit commerce commenced, consequently it appeared that the parties preferred this connection to one purely matrimonial. Upon this Lord Eldon remarked, that "such a connection was likely to continue illicit."[3] This is in accordance with propositions laid down in earlier sections of the present chapter.[4] Yet slight circumstances may show — the slightest ought to be pressed into the service of showing — a change in the mind of the parties respecting such their connection; resulting in the presumption of marriage, though the intercourse was wilfully wrongful at first.[5]

§ 511. **Continued — Presumed Change.** — In a Texas case it was observed: "There is no evidence as to the character of their [the parties'] intercourse in Louisiana; but on their emi-

[1] Wilkinson *v.* Payne, 4 T. R. 468. And see Breakey *v.* Breakey, 2 U. C. Q. B. 349, 355.

[2] Ante, § 458; Piers *v.* Piers, 2 H. L. Cas. 331.

[3] Cunninghams *v.* Cunninghams, 2 Dow. 482, 502.

[4] Ante, § 506 et seq.

[5] Bond *v.* Bond, 2 Lee, 45, 6 Eng. Ec. 28; Hyde *v.* Hyde, 3 Bradf. 509. And see Rose *v.* Clark, 8 Paige, 574; Donnelly *v.* Donnelly, 8 B. Monr. 113.

gration to Texas it assumes all the distinctive marks of the matrimonial relation, and the only argument which can be urged against the actual subsistence of the marriage relation, from and after that period, and the innocence of the cohabitation, must be founded on the supposition that, as the intercourse was illicit at its commencement, it must have always so continued. But admitting that their original intercourse was illicit with the knowledge of both parties, it would be urging the presumption to an unreasonable extent to suppose, that the unlawful character of the connection was unsusceptible of change, and that, when all legal disabilities had ceased to operate, they would voluntarily decline all the honors, advantages, and rights of matrimony, and prefer an association disgraceful to both parties, but peculiarly degrading to the female, and which inflicted upon their innocent offspring the stigma and penalties of illegitimacy. Let it be admitted that this woman had knowingly wandered from the paths of virtue, and that in the weakness of human frailty she had originally yielded to the arts and seductions of the deceased, yet the conclusion does not necessarily follow, that the latter would be unwilling to repair, as far as possible, the wrongs he had inflicted, or that the former would of choice continue in a position so humiliating. . . . . The judgment which would presume that erring humanity would not repent and reform is too harsh to have place in any beneficent system of law, and we cannot yield our assent to any such doctrine." [1]

§ 512. **Common Prostitute — Whites with Blacks.** — If the woman is shown to be a common prostitute, or any fact of the like significance appears in the case, then the presumption of marriage will not be so easily raised; although, even then, the marriage is possible, and in some circumstances should be inferred, though the connection was at first illicit.[2] In like manner, a marriage between a white man and a negro woman will not readily be inferred from cohabitation.[3] These propositions rest partly on the authority of the cases cited in the notes, and partly on the reason of the thing.

[1] Yates *v.* Houston, 3 Texas, 443, 450, 451, opinion by Hemphill, C. J.

[2] Conran *v.* Lowe, 1 Lee, 630, 638.

[3] Armstrong *v.* Hodges, 2 B. Monr. 69; ante, § 260.

§ 513. **Presumption of Fact — Law — Its Weight — Desertion — Cohabitation ceasing.** — As already observed,[1] a marriage is not so easily inferred from mere cohabitation, in those States in which the law requires a certain formal solemnization, and provides for the recording of the marriage, as in those States where marriage may be contracted by mere consent passed between the parties. Yet, as has been abundantly shown, it may be so inferred under all forms of marriage law. The presumption in which the marriage is made to rest, in these cases, is what is called a presumption of fact, not one of law.[2] So it seems, but the distinction between presumptions of fact and of law is not clearly drawn in our jurisprudence, and we should be careful how we speak when discussing a point like this. The weight of the presumption depends upon the circumstances of each particular case; and it may be more or less controlled by matter happening even after the cohabitation ceased; as by the cessation of the cohabitation itself, the contracting of another marriage, and the like.[3] Yet a marriage may be proved by cohabitation and repute, though afterward one of the parties deserted the other.[4] The effect of desertion, of separation by mutual agreement, and the like, upon the evidence of the supposed prior marriage, must depend upon the circumstances of particular cases, rather than upon any one iron rule of law.

§ 514. **Actual or Presumed Divorce.** — Where there has been a divorce *a vinculo* of married persons, the innocent one is everywhere entitled to marry again; and, in a part of our States, the same right is extended also to the guilty. And if this right is not given to the guilty party in his own State, he can generally contract a valid marriage in some other State, by becoming a resident in the other State, or even by going there temporarily for the purpose. Suppose, therefore, parties who were once married are found living in separation, and then one or both of them are found marrying third persons, — Is a divorce

[1] Ante, § 504, 509.

[2] Wilkinson *v.* Payne, 4 T. R. 468; Northfield *v.* Plymouth, 20 Vt. 582. But see Cram *v.* Burnham, 5 Greenl. 213.

[3] Jackson *v.* Claw, 18 Johns. 346; Clayton *v.* Wardell, 5 Barb. 214, 4 Comst. 230; Rose *v.* Clark, 8 Paige, 574; Steadman *v.* Powell, 1 Add. Ec. 58, 2 Eng. Ec. 26; Revel *v.* Fox, 2 Ves. sen. 269; Weatherford *v.* Weatherford, 20 Ala. 548; Hill *v.* Burger, 3 Bradf. 432; Cram *v.* Burnham, 5 Greenl. 213; Senser *v.* Bower, 1 Pa. 450.

[4] Purcell *v.* Purcell, 4 Hen. & M. 507.

from the first marriage to be presumed? Or, must he who would set up such a divorce, prove the divorce by the record? Now, whatever may be the rule in some localities as to marriage, there can be no divorce, in any Christian country, without some formal ceremony. Even among the ancient Jews, there was a "writing of divorcement." And in modern times, and among Christian people, certainly in England and in the United States, the divorce is either a legislative or a judicial record. And, in the language of Professor Greenleaf, "oral evidence cannot be substituted for any instrument which the law requires to be in writing;"[1] but the proof of the matter must be by the writing itself. And this proposition applies to record writings as much as to any other. "It cannot," said Lord Ellenborough, C. J., "be seriously argued, that a record can be proved by the admission of any witness. . . . . There is no authority for admitting parol evidence of it."[2] Therefore it was held in South Carolina, that a Georgia divorce, being a matter of judicial record in Georgia, was provable in South Carolina only by the record.[3] And this is undoubtedly the general rule in all our States, whether the divorce to be proved be a domestic or a foreign one.[4]

§ 515. **Continued.** — But this general rule, like most other general rules, has its limits. Precisely what they are, it may not be easy to state. In the same State of South Carolina, where the general rule was, as we have seen, laid down in the general terms, — there being, in the case then under consideration indeed, no intimation of the existence of any qualification, — the following language was, in another case, employed: "That an act of the legislature [and the court was here inquiring whether a legislative South Carolina divorce would be presumed for the purpose of giving validity to a subsequent marriage], after a lapse of twenty years' possession and use, may be presumed, is, I think, too clear to admit of doubt. Like a grant, it may be presumed, notwithstanding the public records show no such thing existed. This, however, is altogether confined to cases in which the leg-

[1] 1 Greenl. Ev. § 86; 1 Taylor Ev. § 370.

[2] Rex *v.* Castell Careinion, 8 East, 77.

[3] The State *v.* McElmurray, 3 Strob. 33, 41.

[4] Ante, § 477.

islature might or might not act. It cannot apply where, from the constitution, or a sort of common law of our own, the legislature never have and never will act. Best, in his treatise on Presumptions,[1] tells us, there is hardly a species of act or document, public or private, that will not be presumed in support of possession. 'Even acts of Parliament may be thus presumed.' Under this authority, if a divorce ever had taken place, or ever could take place, in this State,[2] I would not hesitate to say, that an act for that purpose ought to be presumed in this case," — being one in which more than twenty years had elapsed since the second marriage.[3] Accordingly in a Texas case, where a woman married a husband, with whom she afterward lived for sixteen years; but the man, at the time of this his second marriage, had a former wife living from whom he had been more than eight years separated, and she had married again two years previous to this marriage, — it was held, that a divorce should be presumed to have taken place in respect to the first marriage, before the subsequent marriages were entered into.[4] And there is a Massachusetts case in which something like this, where the marriage and divorce were both in a foreign country, was rather assumed than held.[5]

§ 516. **Continued.** — It is said by Professor Greenleaf, that the presumption we are considering — he was not speaking, however, of divorce matters — "does not extend to records and public documents, which are supposed always to remain in the custody of the officers charged with their preservation, and which, therefore, must be proved, or their loss accounted for, and supplied by secondary evidence."[6] In support of this proposition, he refers to two cases,[7] which, in a general way, do lend countenance to the doctrine; though the opposite doctrine is quite as well sustained, on authority, by Mr. Best.[8] "For these last two hundred years," says Buller, J., "it has been considered as clear law that grants, letters-patent, and

[1] Best Presump. p. 144, § 109.
[2] Ante, § 38, 42, 43.
[3] McCarty *v.* McCarty, 2 Strob. 6, 10, opinion by O'Neall, J.
[4] Carroll *v.* Carroll, 20 Texas, 731.
[5] Commonwealth *v.* Belgard, 5 Gray, 95.
[6] 1 Greenl. Ev. § 20.
[7] Brunswick *v.* McKean, 4 Greenl. 508; Hathaway *v.* Clark, 5 Pick. 490.
[8] Best Presump. 144, 145.

records may be presumed from lapse of time. It is so laid down in Lord Coke's time,[1] as undoubted law at that time; and in modern times, it has been adopted in its fullest extent."[2] And that this doctrine has, with the rest of our common law, found its way across the Atlantic to this country, may be seen from a Virginia case, in which naturalization — a matter of record, corresponding very much to divorce — was presumed from lapse of time, and the exercise, by the person supposed to be naturalized, of the rights of citizenship. "The witnesses," observed the judge, "say he was an active partisan at elections, and voted both in North Carolina and after he removed to this State: that such was the temper of the times, and the watchful jealousy of Americans towards foreigners (as he was known to be) that it would have been impossible for an alien to have acted as he did, with impunity; and indeed, that no such would have been permitted to remain in the country. . . . . If all this mass of evidence, after the lapse of forty-five years, be not sufficient to authorize the conclusion that Rice was a citizen, what less than point-blank proof will do?"[3]

§ 517. **Continued.** — That it would be unsafe and impolitic to presume a divorce in all cases in which a person, formally married, is found acting as a single person only would be authorized in law to act, is a proposition which no one will dispute. On the other hand, that it would be mischievous never to presume a divorce, — there is lapse of time, — there is the impossibility, in many cases, of third persons, interested in the marriage, knowing where to look for the record evidence of a former divorce, — there is the liability of records being destroyed, and if the person searching does not know where the record was kept he cannot prove the record destroyed, in order to let in secondary evidence, — many other things for consideration there are, — consequently, that it would be mischievous never to presume a divorce, whatever the circumstances, is a proposition equally plain with the other. At this point, then, let us drop the discussion, trusting to future adjudications for further light on this subject.

[1] Referring to Bedle *v.* Beard, 12 Co. 4, 5.

[2] Read *v.* Brookman, 3 T. R. 151, 158.

[3] Nalle *v.* Fenwick, 4 Rand. 585, 587, opinion by Carr, J.

§ 518. **Continued.** — And when this question is further unfolded by adjudication, there will arise another class of circumstances to be considered. Suppose a married man enters into a second marriage in disregard of the claims of his living wife. In reason, the probabilities are strong, that the living wife, having now evidence whereon she could obtain a divorce for the adultery, would obtain such divorce before entering upon another marriage. Here is a double presumption of innocence, — when should this double presumption be allowed to dispense with the proof of the record? This point was somewhat involved in the facts of a case already mentioned.[1] Then, if a divorce be presumed or proved, — under what circumstances shall the guilty party be presumed to have entered into a valid marriage with the person with whom the invalid one was celebrated? This point is somewhat illumined by discussions which have gone before in these chapters.

CHAPTER XXVIII.

SPECIAL VIEWS OF THE PROOFS WHERE THE SOLEMNIZATION WAS IN A FOREIGN STATE.

§ 519. **When the Discussion important — Proofs by Cohabitation and Repute.** — In those ordinary civil issues wherein marriage is provable by cohabitation and repute, the questions to be discussed in this chapter do not often practically arise. Sometimes, indeed, the record is in these issues produced, or witnesses testify to having seen the marriage performed; but practitioners, who are wise, will not needlessly entangle themselves in any doubtful meshes of the law: therefore, where the marriage is a foreign one, and there have been cohabitation and

[1] Carroll *v.* Carroll, 20 Texas, 731; ante, § 515.

repute in the country in which it is to be proved, they will simply present this evidence, unless the other party goes into the other, and makes no mention of the foreign ceremony. But as there are some issues in which this course cannot be taken, and as sometimes the other party will in the ordinary issues insist upon getting at the real facts of a case, the particular discussion designed for this chapter becomes necessary.

§ 520. **How the Chapter divided.** — We shall consider, I. The Effect of proving a Fact of Marriage abroad, without proving the Foreign Law; II. What is the Proper Proof of the Foreign Marriage Law, assuming Proof to be necessary; III. The Burden of Proof as to the Foreign Law; IV. A Few Remaining Points.

I. *The Effect of proving a Fact of Marriage abroad without proving the Foreign Law.*

§ 521. **General View.** — We have seen, in various parts of the foregoing discussions in this volume, that marriage is a thing of universal right, acknowledged everywhere throughout the Christian and even the pagan world, regulated substantially by one rule, cherished by all people, and received into the unwritten code of international law. If, then, there is proof, that, in some foreign country, a man and a woman agreed with each other to be, from the time of the agreement ever afterward, husband and wife; and if, in such a case, no evidence appears on the one side or on the other of what is the law of the country in which the agreement was made, — in such circumstances, seeing that, as explained in a previous chapter,[1] the court must decide such a case as this in one way or the other, the decision ought to be in favor of the marriage, whatever technical or local rules may prevail on the subject of marriage in the country in which the court sits. *Ought to be* are the words; because we shall see, as we proceed, that there is, at least, no uniform current of decision in favor of such a proposition, if indeed it is anywhere, in terms broad as thus stated, maintainable upon the basis of actual adjudication. Let us narrow the proposition a little, and then we shall find it to rest sufficiently on the decisions of some tribunals, though

[1] Ante, § 411.

not upheld by those of others. In its narrowed form it is, that where, besides proof of a mutual undertaking by the parties in a foreign country to be husband and wife, there is evidence also of their continuing afterward to cohabit as such there, — the people of the country accepting and treating them as married, — this is sufficient, though there be no further evidence given of the foreign law. Surely no judicial tribunal ought to reject this proposition; for, if there should be doubt about the former one, here the parties had their marriage sanctioned by the voice of the community in which it took place; and, though there might have been an error in the popular judgment on the point, yet, this being a matter pertaining to the foreign law, and the foreign law being a thing of which the judge does not take judicial cognizance, the probabilities, in point of evidence, are, that the popular judgment abroad was correct.

§ 522. **Continued — Foreign and Domestic distinguished.** — And the difference between a foreign and domestic marriage, in point of proof, is, that the former pertains altogether to the department of evidence, though, indeed, the evidence as to the foreign law is for the judge, and not for the jury;[1] while the latter pertains in part to the law, and in part to the evidence. When a court is to decide upon a question of domestic law, — a thing which, in theory, is absolute, and absolutely known by the judge, — there is no balancing of probabilities, or acting upon presumptions. But when the matter to be settled is one of evidence, presumptions come in, probabilities are balanced; and the jury, or the judge, as the case may be, guesses the way through by the aid of the double light of presumption and of testimony. And the law presumes a fact to be whatever the usual course of things would make it.[2] It is plain that, in general, parties who in the foreign country go through with a form of marriage, and thence onward live together there as husband and wife, are married persons, and not persons living in violation of good order and decency. Consequently the burden is on the party who sets up, that, in the particular instance, the fact does not accord with the

[1] Ante, § 418–421.

[2] And see, as illustrating this principle, Bishop Stat. Crimes, § 1051, 1052.

general course of things, to establish, by evidence, the exception. Therefore, in every view, if there has been a foreign marriage proved before a court of our own country, and there is no evidence before the court as to what the foreign law is, the court should say to the jury, — "Gentlemen, as the probabilities are in favor of this marriage being good, there is no ground on which you can bring in a verdict to the contrary. The marriage may not, indeed, be good; but, if truly it is not, it is the duty of the party objecting to show this fact to you." This is what ought to be, — what the general principles of our law of evidence require in such a case, — what the writer of these volumes trusts will be, when this branch of our law is better considered, — yet, as we are about to see, it is not safe to lay this down as being absolute law now.

§ 523. **Proof of Law, then Marriage — Evidence of the Law.** — Proceeding, therefore, more in the line of actual adjudication, we may observe, that, in all cases where a foreign marriage is to be proved, it is an orderly and correct way, to which if the party chooses it no objection can be taken, to prove first the foreign law, and then the marriage solemnized according to the directions of this law.[1] And many of the cases are distinct, that the foreign law must be proved.[2] But even these authorities have admitted evidence of the foreign law from non-professional witnesses,[3] and have also allowed the law to be inferred from the open and public solemnization of the marriage itself,[4] especially if celebrated by a minister of religion, or other person shown to be in the habit of performing the marriage ceremony.[5]

§ 524. **That Distinct Proof of Foreign Law not necessary — Qualification of the Doctrine.** — A learned Massachusetts judge observed, in a settlement case, where the marriage in contro-

[1] Warner *v.* Commonwealth, 2 Va. Cas. 95; Fornshill *v.* Murray, 1 Bland, 479; Montague *v.* Montague, 2 Add. Ec. 375, 2 Eng. Ec. 350.

[2] 2 Phil. Ev. with C. & H.'s notes, 209; Roscoe's Crim. Ev. 286; 2 Burn Ec. Law, by Phillim. 476 c.; Smith *v.* Smith, 1 Texas, 621; Phillips *v.* Gregg, 10 Watts, 158; Rex *v.* Whetford, cited 5 Bentham's Rationale of Judicial Evidence, 160.

[3] Phillips *v.* Gregg, 10 Watts, 158. But see 2 Stark. Ev. 519; and Rex *v.* Whetford, supra.

[4] Rex *v.* Brampton, 10 East, 282, 289, 290; Duncan *v.* Duncan, 2 Monthly Law Mag. 612. The point is stated, but not decided, in Nixon *v.* Brown, 4 Blackf. 157.

[5] The State *v.* Kean, 10 N. H. 347.

versy was celebrated in a sister State of our Union: "It is said on behalf of the plaintiffs, that, a marriage *de facto* being proved, it should be presumed to be according to the laws. And this appears to be reasonable; as, if a marriage were proved to have taken place in France, for instance, it should seem fit to require the party who denies the marriage to prove its invalidity."[1] And the doctrine thus intimated has been judicially approved in our neighboring province of Upper Canada, where, in its Court of Queen's Bench, the learned chief justice observed: "There is no question that the *lex loci* is to govern in such cases, and that when a marriage has been in fact openly solemnized we must presume it to have been solemnized according to the *lex loci*, unless, upon the proof given of the facts and of the law then prevailing, we see clearly that it was otherwise."[2] Yet in this same tribunal, when the question arose upon an indictment for polygamy, and the first marriage was alleged to have taken place in New York, and there was proof of the solemnizing fact having transpired there, but no sufficient proof of the law of New York, the court refused to sustain the conviction.[3] Here was a case of conflict between two marriages; one a domestic, and the other a foreign marriage; and the court refused to allow the former to be overthrown by the latter, without express proof of the foreign law. And we have American authority pointing in the same direction.[4] In a polygamy case in Virginia, where the first marriage was abroad, no very formal proof of the foreign law was required, and Staples, J., observed: "When a witness testifies to a marriage in a foreign State, solemnized in the manner usual and customary in such State, by a person duly authorized to celebrate the rites of marriage, and the parties afterwards lived together as man and wife, this is as satisfactory evidence of a valid marriage as could be expected or desired; and, in such case, it is not necessary to prove the

[1] Parker, C. J., in Raynham *v.* Canton, 3 Pick. 293, 297.

[2] Robinson, C. J., in Breakey *v.* Breakey, 2 U. C. Q. B. 349, 355; s. p. also, by Dargan, J., in Reed *v.* Hudson, 13 Ala. 570. And see Ewen's Case, 6 N. Y. City Hall Rec. 65; Trower's Case, Macqueen H. L. Pract. 656; Ward *v.* Dey, 1 Robertson, 759.

[3] Reg. *v.* Smith, 14 U. C. Q. B. 565. And see Graham *v.* Law, 6 U. C. C. P. 310; Burt *v.* Burt, 2 Swab. & T. 88.

[4] Smith *v.* Smith, 1 Texas, 621.

law of such State, or to offer further evidence of a compliance with its provisions." [1]

§ 525. **Qualifications of Doctrine, continued.** — Is there, in cases where the one marriage is abroad, and the other is at home, and there is no proof of the foreign law beyond what is involved in the mere proof of the fact of marriage, a conflict of presumption against presumption, such as should require the fact of the foreign law to be established? [2] Such a case does not depend, as regards the foreign marriage, upon the presumption of the prisoner's innocence alone, but upon the presumption also of the innocence of the persons engaged in its solemnization, and of good order prevailing in the community in which the solemnization takes place, and in which (where this further fact appears) the parties are accepted and received as lawful husband and wife. And presumptions of this class would seem in general to be just as available against defendants in criminal cases, as parties in civil causes. For example, in these very indictments for polygamy, if a domestic marriage is to be proved, there need be, as we have seen,[3] no direct evidence of the official character of the person solemnizing the marriage; for, if he was accustomed to act in such capacity, the presumptions of good order and of innocence come in, as against the prisoner, who, if he would deny the authority of the solemnizing person, as against these presumptions, must prove even this negative. Therefore it is impossible to hold the latter Upper Canada decision to be correct in legal principle.

§ 526. **Distinct Proof of Foreign Law not necessary, continued.** — In a case before the Consistory Court of Dublin, Dr. Radcliff said: "If the fact of marriage be once proved directly or by circumstances, its lawfulness is presumed; and it lies on the opponent to prove the illegality, as being contrary to the *lex loci*, or otherwise; so that here, if the marriage was in Jersey, I must take it to be according to the laws of Jersey, *semper præsumitur pro matrimonio*. The case of Steadman *v.*

[1] Bird *v.* Commonwealth, 21 Grat. 800, 807, 808.

[2] In the case stated ante, § 440 *a*, there was proof of the foreign law, and it appeared that the particular marriage testified to was not valid by such law.

[3] Ante, § 495, 496.

Powell[1] is an authority for both these positions."[2] In a recent English case, which was an action for criminal conversation, the marriage was celebrated at Beyrout, in Syria, according to the rites of the Church of England, by an American missionary, not in Episcopal orders. Such a marriage was, according to the English law, a mere contract of marriage *per verba de præsenti*. No proof was given of the Mohammedan law which prevailed at Beyrout; but the ceremony of marriage was followed by cohabitation. And the case having been suspended that the court might have the benefit of the decision in The Queen *v.* Millis then pending before the House of Lords,[3] the proof of the marriage was, after this decision, held by the Court of Exchequer not to be sufficient; because such a marriage, within the principle established by the decision, would have been invalid at the common law. The parties were European, — a fact, however, which could hardly be deemed material.[4] Yet it may be observed, that, the decision in The Queen *v.* Millis being contrary to the American law,[5] the principle established in this Court of Exchequer case would, adopted in this country, lead to the opposite result; namely, of holding, *prima facie*, all marriages to be valid which were celebrated in a foreign country, if the fact of present mutual consent appears, and there is no evidence produced of the foreign law.[6]

§ 527. **Continued.** — How, in this Court of Exchequer case, the judges could assume, as a presumption of legal rule, that, even *prima facie*, the technical common law, as expounded in The Queen *v.* Millis, whereby the presence of a priest in holy orders is essential to matrimony, — a principle in the law which it was in the same case conceded had not reached even to Scotland, much less to the continent of Europe, — had vaulted over to Asia and become established in Mohammedan Beyrout, to the exclusion alike of the law of nature and of the Mohammedan religion, it is not easy to perceive. Still, as we

[1] Steadman *v.* Powell, 1 Add. Ec. 58, 2 Eng. Ec. 26.

[2] Else *v.* Else, Milw. 146, 150, 151.

[3] See ante, § 275.

[4] Catherwood *v.* Caslon, 13 M. & W. 261.

[5] Ante, § 279.

[6] And see Starr *v.* Peck, 1 Hill, N. Y. 270.

have already seen,[1] there are authorities which recognize the doctrine, that the law of the foreign country shall be deemed to be the same as our own, until the contrary is proved.[2] But it is not necessary to go over again here the discussion which occupied us in a previous chapter.

§ 528. **Continued.** — When we are inquiring after the law as it is, there is but little use in attempting to rebut the evidence which comes from adjudication, by showing that the assumed proposition, if received as law, will be inconvenient in its working. Yet in cases of conflict, this line of argument is just, and the conclusions drawn from it should have more or less weight. And the inconvenience of adhering to more rigid rules, in the proof of foreign marriages, than those which the author has in the foregoing sections mentioned as being just in principle, must, in the United States, be very considerable. Here we have congregated immense masses of refugees from poverty and oppression in the old world, not to speak of the fact that our own States are foreign to one another as respects this class of law; and if, when a foreign marriage is to be proved, the proof of the foreign law must affirmatively go with it, there is no end to the useless trouble which courts and litigants must have in these cases. And this thought brings us to our next sub-title; namely, —

II. *What is the Proper Proof of the Foreign Law, assuming Proof to be necessary.*

§ 529. **The Witnesses.** — This question was, in a great measure, answered in a previous chapter.[3] But there are some points which remain for consideration here. One point, there omitted, relates to the kind of witnesses by whom, when proof of the foreign law is to be made orally, the testimony shall be given. In a late English treatise on the law of Evidence, the writer,[4] discoursing of the general doctrine, and without particular reference to marriage, observes: "In order to render a

[1] Ante, § 411.

[2] Bonneau *v.* Poydras, 2 Rob. La. 1; Legg *v.* Legg, 8 Mass. 99; The State *v.* Patterson, 2 Ire. 346; Crosby *v.* Huston, 1 Texas, 202, 231; Leavenworth *v.* Brockway, 2 Hill, N. Y. 201.

[3] Ante, § 408 et seq.

[4] 2 Taylor Ev. § 1281.

witness competent to give evidence on a point of foreign law, he must either be a professional man belonging to the country whose laws are in question, or at least he must hold some official situation, which presumes, because it requires, sufficient knowledge.[1] Thus, a judge, an advocate, a barrister, or an attorney, will be an admissible witness to prove the laws of his own country; and an attorney-general, though not a barrister, as is occasionally the case in some of our colonies, may be examined as a person *peritus virtute officii*.[2] So, a Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in this country, has, in virtue of that office, been considered as a person skilled in the matrimonial law of Rome, and therefore an admissible witness to prove that law.[3] Whether a French vice-consul here would be allowed to prove the law of France as a person officially skilled, may admit of some doubt, though on one occasion the testimony of such a person was admitted by Lord Tenterden.[4] Be this as it may, the law of a foreign country cannot be proved even by a jurisconsult, if his knowledge of it be derived solely from his having studied it at a university in another country.[5] Neither, as it seems, can a merchant or other person, who holds no official situation, and who is unconnected with the legal profession, be heard to expound the law, though the judge may be satisfied that he really possesses ample knowledge on the subject.[6] If the question, however, relates to a foreign custom or usage, any witness will be admissible who is acquainted with the fact;[7] and, therefore, a London hotel-keeper, who was formerly a merchant and stock-broker at Brussels, has been permitted to prove the mercantile usage in Belgium, with respect to the

[1] Sussex Peerage Case, 11 Cl. & F. 85, 134.

[2] Id. 124, per Lord Brougham; Rex *v.* Picton, 30 Howell St. Tr. 509–512; Ward *v.* Dey, 7 Notes Cas. 96, 101–106.

[3] Sussex Peerage Case, 11 Cl. & F. 85, 117–134.

[4] Lacon *v.* Higgins, 3 Stark. 178, D. & Ry. N. P. C. 38, s. c.

[5] Bristow *v.* Sequeville, 5 Exch. 275; 3 Car. & K. 64, s. c. nom. Bristow *v.* De Secqueville.

[6] Per Lord Lyndhurst, C., stating the unanimous opinion of the judges and the Lords, in Sussex Peerage Case, 11 Cl. & F. 134, and overruling Rex *v.* Dent, 1 Car. & K. 97.

[7] Ganer *v.* Lanesborough, 1 Pea. 18; explained by Lord Lyndhurst, C., in Sussex Peerage Case, 11 Cl. & F. 124. See Mostyn *v.* Fabrigas, 1 Cowp. 174, per Lord Mansfield; Feaubert *v.* Turst, Prec. Ch. 207.

presentment of a promissory note that was made payable in a particular place." [1]

§ 530. **Continued.** — These doctrines undoubtedly prevail, in a general way, in the United States.[2] Yet probably in England, certainly here, there can be proof of the laws of a peculiar and isolated foreign people, like the Chinese, by non-professional witnesses.[3] And the doctrine itself maintains, that, as to marriage, the evidence of one who, from his calling and his studies, has been required to make himself, and has made himself, particularly acquainted with the foreign marriage law, may testify to it, though he is not, as to the general jurisprudence of the country, a lawyer.[4] Yet the decisions upon this general subject somewhat fluctuate; while, however, they seem to hold fast to so much as is above stated. In a late English polygamy case, where one of the marriages was celebrated in Scotland, a woman called as a witness stated, that she was present at the marriage ceremony performed at a private house in Scotland by a minister of some denomination, that she herself was married in the same way, and that, in Scotland, parties always marry in private houses. But it was held, that she was not a competent witness to the law of Scotland, and that the marriage was not sufficiently proved. "There may be certain cases perhaps," observed Jervis, C. J., "in which it may not be necessary to have a lawyer to give evidence; but the court is clearly of opinion, that some witness conversant with the Scottish law of marriage should have been called on the part of the crown." And Alderson, B., remarked: "The House of Lords, in the Sussex Peerage Case, appears to have overruled the decision of Mr. Justice Wightman, who held, that an unprofessional witness might prove the law of Scotland with regard to marriage." [5]

[1] Vander Donckt *v.* Thellusson, 8 Com. B. 812.

[2] See Dougherty *v.* Snyder, 15 S. & R. 84; Tyler *v.* Trabue, 8 B. Monr. 306; Dyer *v.* Smith, 12 Conn. 384; Walker *v.* Forbes, 26 Ala. 139.

[3] Wilcocks *v.* Phillips, 1 Wallace, Jr. 47.

[4] Thus, in a Virginia case, it was held that a minister of religion or priest might be admitted to prove the foreign marriage law; because, said Staples, J., "all persons who practise a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is required." Bird *v.* Commonwealth, 21 Grat. 800, 808.

[5] Reg. *v.* Povey, 14 Eng. L. & Eq. 549, 6 Cox C. C. 83, 84, 1 Dears C. C.

§ 531. **Continued.** — There is an English case in which the question of the proof of marriage rose in a suit for divorce, founded on the allegation of adultery. The only doubt agitated in the case related to the proof of the marriage of the parties, which marriage was celebrated at Batavia, in the island of Java. A witness deposed, that he was present in a Lutheran church (the religion of the country being Lutheran or Calvinistic) where the marriage ceremony was performed by a person appearing to be in holy orders, but no banns had been previously published, and the witness could not say the marriage was valid by the *lex loci*, and no certificate was produced. The learned judge, Dr. Lushington, held the proof to be sufficient, and made the following pertinent observations: "If it was absolutely necessary in all cases of this description, where the marriage was in a foreign country, that I must have actual and direct proof that it was according to the *lex loci*, and valid by that law, — if that was the rule of these courts, it would lead to considerable inconvenience. For the last twenty years, since the pacification with France, so many marriages have been contracted by British subjects in foreign countries, — in South America and westward and eastward to the Philippine Islands, — that if the law required absolute proof of their validity according to the *lex loci*, it would amount pretty nearly to a denial of justice. I do not apprehend that such strictness of proof is required." [1]

§ 532. **Continued — Confessions.** — Now, if there must be proof of the foreign law, and if the evidence of this law must come from professional witnesses, or at least from witnesses particularly acquainted with the foreign law of marriage, the result is, that, on principle, where a man is indicted for polygamy, and the first marriage was celebrated abroad, and

32. For prior rulings of Wightman, J., see Reg. *v.* Dent, 1 Car. & K. 97; Reg. *v.* Simmonsto, 1 Car. & K. 164, 1 Cox C. C. 30; Reg. *v.* Newton, 2 Mоody & R. 503. So, in an Irish case it was held, that on a trial for bigamy, where the first marriage took place in Scotland, it is not necessary that the validity of that marriage should be proved by a person conversant with the laws of Scotland; but it is sufficient if the jury believe that there was in fact a valid marriage according to the laws of that country. Reg. *v.* Charleton, Jebb. 267, 1 Crawf. & Dix C. C. 315.

[1] Duncan *v.* Duncan, 2 Monthly Law Magazine, 612. See also the observations of the same learned judge, in Cood *v.* Cood, 1 Curt. Ec. 755, 6 Eng. Ec. 452, 456. See also Rex *v.* Brampton, 10 East, 282.

he has confessed the marriage, evidence of this his confession cannot be received against him, except so far as it states specific circumstances, unless he is a person who, being a lawyer or otherwise learned in the foreign marriage law, would be competent to be a witness as to the law. Yet, on the other hand, were the marriage a domestic one, the confession would be receivable. And in New York, where no confessions of marriage are, in this class of issues, deemed adequate evidence of a domestic marriage, this result was held applicable to a case where the marriage confessed was celebrated in Ireland. But the learned judge observed: "I see no reason for making a distinction between cases of marriage in a foreign country and marriage in this State. A careful examination of the decisions shows that none has really been recognized."[1] Yet there are various cases which hold the confession of a foreign marriage, deliberately made, to be sufficient in these circumstances, as well in respect to the foreign law as to the rest.[2]

§ 533. **Alleging and proving Foreign Law.** — The general doctrine was in a previous chapter mentioned, that a party relying upon the foreign law must set it up in allegation and establish it in proof.[3] If we, therefore, reject what is set down in the foregoing sections as the better doctrine, we must turn to that. And that doctrine has been held applicable to marriage celebrated abroad;[4] as, for instance, Dr. Swaby in one case observed, in reference to a Scotch marriage and the writing signed by the parties at the time of entering into the marriage: "If this exhibit was meant to be offered to the court as a *constituent*, either wholly or in part, of the marriage

[1] Gahagan *v.* People, 1 Parker, 378, 386. See, as further illustrating this matter, Welland Canal *v.* Hathaway, 8 Wend. 480, 484; Smith *v.* Elder, 3 Johns. 105, 114. And see People *v.* Lambert, 5 Mich. 349.

[2] Reg. *v.* Newton, 2 Moody & R. 503, as to which, and the next case, see ante, § 530; Reg. *v.* Simmonsto, 1 Car. & K. 164; 1 Cox C. C. 30; Cayford's Case, 7 Greenl. 57.

[3] Ante, § 418.

[4] Ward *v.* Dey, 1 Robertson, 756, 762; Montague *v.* Montague, 2 Add. Ec. 375, 2 Eng. Ec. 350; Herbert *v.* Herbert, 2 Hag. Con. 263, 271, 3 Phillim. 58, 4 Eng. Ec. 534, 538, 539; Ruding *v.* Smith, 2 Hag. Con. 371; Middleton *v.* Janverlin, 2 Hag. Con. 437; Scrimshire *v.* Scrimshire, 2 Hag. Con. 395; Swift *v.* Swift, 4 Hag. Ec. 139; Price *v.* Clark, 3 Hag. Ec. 265; Lloyd *v.* Petitjean, 2 Curt. Ec. 251.

in question, it should have been *pleaded* to have been such, as I have said, in quite another form, accompanied by an averment, to be sustained by evidence, that such was its effect by the laws, customs, and usages of Scotland."[1] In such a matter as this, however, a court of common law, or even a court of equity, in this country, should, before passing a decision based upon the English ecclesiastical authorities, consider to what extent the peculiar mode of proceeding in the English tribunal may have influenced the conclusion concerning the practice arrived at there. In a Vermont case, Phelps, J., observed: "It is a settled rule that courts do not, *ex officio*, take notice of the laws of a foreign sovereignty, but they are to be pleaded and proven as facts; with this qualification, however, that they may be given in evidence, without being specially pleaded, like other matters of fact, in cases where the rules of pleading do not require the facts to be specifically set forth."[2]

III. *The Burden of Proof as to the Foreign Law.*

§ 534. **General View.** — The foregoing discussions of this chapter, revealing a great contrariety of opinion in the judicial mind in respect to this subject, confirm the writer in the opinions expressed in the opening sections of the chapter, as to what the rules in this matter should be. If, *prima facie*, a marriage solemnized abroad is to be deemed to be valid, it will still be competent for the opposing party to introduce evidence of the foreign law, and thus show it to be invalid. The whole matter, therefore, pertains to the burden of proof. And surely it is just that he who sets up an exceptional case — as, in this instance, that a particular marriage abroad was, contrary to the general rule in respect to foreign marriages, entered into in violation of the foreign law — should prove his case. This is a rule which pervades our whole system of evidence; let it, therefore, find no exception in the matter of foreign marriages.

[1] Nokes *v.* Milward, 2 Add. Ec. 386, 391, 2 Eng. Ec. 356, 359. And see Cood *v.* Cood, 1 Curt. Ec. 755, 6 Eng. Ec. 452, 458.

[2] Pickering *v.* Fisk, 6 Vt. 102, 105. And see, as to marriage, Martin *v.* Martin, 22 Ala. 86; Trimble *v.* Trimble, 2 Ind. 76; Richmond *v.* Patterson, 3 Ohio, 368.

IV. *A few Remaining Points.*

§ 535. **Difficulty of the Proof — Consequences.** — It has been deemed, that the proof of the foreign law may be the more easily dispensed with in proportion as such proof becomes difficult.[1] And surely there is no subject upon which proof of the foreign law is more difficult than on the question of marriage; and, according to a general principle already discussed,[2] marriage is a thing favored in the law, and all intendments should be bent toward its support. Said Abbott, C. J., speaking of the ordinary case of a common contract made abroad: "It would be productive of prodigious inconvenience if, in every case in which an instrument is executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid."[3] And surely to nothing more certainly than to this favored institution of marriage should this observation, with the rule of law of which it is but the expression, be applied.

§ 536. **Conclusion.** — Thus has the author endeavored, in this chapter, to bring before his readers the conflicting views heretofore entertained by various judicial tribunals, upon an important subject; and to indicate what, in his opinion, is the true line upon which decisions should travel. In our various States, there are perhaps a few points, settled in some States one way and in others another way, yet so far settled that further discussion before the tribunals could lead to no change of decision. But in most of the States the law, as to this question, is unsettled, or settled only in part. And although the views of a law writer can have, as such, no authoritative force before any court, yet the reasons which either a law writer or an advocate presents, are, as reasons, just as binding upon the judges as are the reasons which a whole bench of judges put forth in deciding a cause, considered but as reasons. The decision is, indeed, authoritative law in the locality to which the tribunal pertains; but the reasons, as reasons, carry with them nowhere any force which they would not have if enun-

[1] Phillips *v.* Gregg, 10 Watts, 158.
[2] Ante, § 457.
[3] James *v.* Catherwood, 3 D. & R. 190. And see Bristow *v.* Sequeville 5 Exch. 275; Alves *v.* Hodgson, 7 T. R. 241; ante, § 411 et seq.

ciated by the boy who blacks the judge's boots. Whatever force the reasons given in this chapter have within themselves will be felt in the coming times throughout our jurisprudence, be their fate what it may for the present moment. So lives all truth; so dies all error.

CHAPTER XXIX.

SOME REMAINING QUESTIONS AS TO THE PROOF OF MARRIAGE.

§ 537. *Estoppels:* —

Claims of Third Persons — How between the Parties. — There are some issues in which the question of marriage is only apparently involved, not really so. For as respects third persons, if a man and woman hold themselves out to the community as being husband and wife, while they are not such in fact, they may be subjected to the same liabilities which would ensue from any undertaking based on the assumed marriage, the same as though they were married in fact. Thus, the man may be made to pay for necessaries furnished the supposed wife; for to permit him to deny his liability would be to suffer a fraud upon the vendor. In such a case, proof of cohabitation, and of the representation of the defendant, is not merely sufficient *prima facie* evidence, it is conclusive; because the question at issue is not one of marriage, but of representation.[1] Yet where there is no principle of this nature involved, a man may deny a marriage, or the validity of a marriage, which he has once recognized.[2] And though the parties may be estopped as to third persons, against whom they cannot be heard to deny their marriage, they will not necessarily be so between themselves; as, for example, in a divorce suit.[3] Yet it appears that there are circumstances in which they will be estopped as between themselves.[4]

[1] Gathings *v.* Williams, 5 Ire. 487; Young *v.* Foster, 14 N. H. 114; Ponder *v.* Graham, 4 Fla. 23; Johnston *v.* Allen, 39 How. Pr. 506; 1 Greenl. Ev. § 27, 207, 208.

[2] Ponder *v.* Graham, supra.

[3] Amory *v.* Amory, 6 Rob. N. Y. 514. And see Robbins *v.* Potter, 98 Mass. 532.

[4] Johnson *v.* Johnson, 1 Cold. 626.

§ 538. *Fact of Marriage:* —

Necessary in most Issues. — We have seen,[1] that the phrase "fact of marriage" has a technical meaning in the law of evidence; and that there are but few issues in which this fact of marriage, in the technical meaning of the expression, need be proved. But not using the words technically, probably all the issues which do not fall within the principle stated in the last section involve, in reality, whatever be the form in which the evidence presents itself, the question of what may be truly called marriage or no marriage in fact. And when the party holding the affirmative has presented a presumptive case of marriage, the opposite party may, if he can, show that, in truth, there was no marriage, notwithstanding the probabilities of marriage, or the *prima facie* case of marriage, which the evidence thus far adduced presents.[2] When the matter comes before a court of common law, the question of marriage or no marriage is, of course, to be decided by the jury, under proper instructions from the bench.[3]

§ 539. *Clandestine Marriages:* —

Effect on the Evidence. — If a marriage is clandestine, this circumstance may considerably influence the result to which the jury or the judge will arrive, on the question of fact. In a previous section,[4] the reader observed, that Radcliff, in one case, appeared to consider the proven fact of the marriage having been intentionally a secret one, as, under the circumstances, rather aiding than otherwise the other proofs. But in a New York case the surrogate observed: "The policy of the law is opposed to concealment of the marriage contract. Publicity affords security. Upon this application for letters of administration, there is an effort to establish a secret marriage. There was no open cohabitation or acknowledgment, no mark or token of the relationship; to external appearance the parties lived as single persons; and the alleged contract [of marriage] was first announced when the lips of the decedent were sealed by

[1] Ante, § 482, 485, 486.

[2] Ante, § 434; Taylor *v.* Taylor, 2 Lee, 274, 6 Eng. Ec. 124; Jenkins *v.* Bisbee, 1 Edw. Ch. 377; Stevenson *v.* McReary, 12 Sm. & M. 9, 56; Dunbarton *v.* Franklin, 19 N. H. 257; Telts *v.* Foster, 1 Taylor, 121.

[3] Cockrill *v.* Calhoun, 1 Nott & McC. 285; Allen *v.* Hall, 2 Nott & McC. 114.

[4] Ante, § 488.

death. In such a case there is no presumption in favor of marriage; the presumption is against it. There is no ground for invoking the charities of the law; but the concealment excites suspicion, and calls for rigid scrutiny." [1] And there can be little doubt, that, in pronouncing these apparently dissimilar opinions, as applied to dissimilar circumstances, both judges uttered the true language of the law. No exact legal formula can be given for this class of cases.

§ 540. *Marriage Repute:* —

Effect of, as Evidence — Pedigree. — What weight is to be given to the single fact that parties are reputed to be married, is a question of difficulty; because, in the cases, this fact seldom or never stands alone. We have already seen, that, viewed as the shadow cast by the great central fact of matrimonial cohabitation, it is in the highest degree important.[2] There are circumstances in which, in cases of pedigree, family and other like repute is not only admissible, but sufficient evidence;[3] yet there is a distinction between these cases and ordinary ones in which the question of marriage or no marriage is the matter in controversy.[4] For "in cases of pedigree," observed Story, J., "the rules of law have been relaxed in respect to evidence, to an extent far beyond what has been applied to other cases." [5] And there are circumstances in which the courts have allowed the evidence of marriage to proceed almost upon the basis of

[1] Cunningham *v.* Burdell, 4 Bradf. 343, 454, 455.

[2] Ante, § 438; Henderson *v.* Cargill, 31 Missis. 367; Spears *v.* Burton, 31 Missis. 547.

[3] Ford *v.* Ford, 7 Humph. 92; Davis *v.* Wood, 1 Wheat. 6; Vaughan *v.* Phebe, Mart. & Yerg. 5; Douglass *v.* Sanderson, 2 Dall. 116; White *v.* Strother, 11 Ala. 720; Kelly *v.* McGuire, 15 Ark. 555; Saunders *v.* Fuller, 4 Humph. 516; Greenwood *v.* Spiller, 2 Scam. 502; Kaywood *v.* Barnett, 3 Dev. & Bat. 91; Strickland *v.* Poole, 1 Dall. 14; Jackson *v.* Cooley, 8 Johns. 128; Speed *v.* Brooks, 7 J. J. Mar. 119; Birney *v.* Hann, 3 A. K. Mar. 322; Elliott *v.* Peirsol, 1 Pet. 328; Waldron *v.* Tuttle, 4 N. H. 371; Stein *v.* Bowman, 13 Pet. 209; Jackson *v.* Browner, 18 Johns. 37; Chancellor *v.* Milly, 9 Dana, 23; Ewell *v.* The State, 6 Yerg. 364; Flowers *v.* Hanalson, 6 Yerg. 494; Ewing *v.* Savery, 3 Bibb. 235; Emerson *v.* White, 9 Fost. N. H. 482; Mooers *v.* Bunker, 9 Fost. N. H. 420; Caujolle *v.* Ferrie, 26 Barb. 177; Woodard *v.* Spiller, 1 Dana, 179; Chapman *v.* Chapman, 2 Conn. 347.

[4] Westfield *v.* Warren, 3 Halst. 249. And see Henderson *v.* Cargill, supra; Mima Queen *v.* Hepburn, 7 Cranch, 290; Jackson *v.* Boneham, 15 Johns. 226; Brooks *v.* Clay, 3 A. K. Mar. 545; Shearer *v.* Clay, 1 Litt. 260; Independence *v.* Pompton, 4 Halst. 209; Wilmington *v.* Burlington, 4 Pick. 174; Everingham *v.* Messroon, 2 Brev. 461.

[5] Chirac *v.* Reinecker, 2 Pet. 613, 621.

the evidence of pedigree, as to reputation.[1] Perhaps it may not be easy to draw, on the authorities, the distinction here; but in New Jersey the doctrine is laid down, that, although in questions of pedigree the declarations of deceased members of a family as to marriages are admitted, yet, where the marriage is to be shown as a substantive fact, it is within none of the exceptions to the general rule, and this species of evidence cannot be received.[2] A Louisiana case holds, that a marriage celebrated in Louisiana, while the State was under the dominion of Spain, may be established by reputation.[3]

§ 541. *Declarations accompanying Cohabitation: —*

How viewed. — Of a nature akin to reputation may be mentioned the declarations of the parties, made while they are cohabiting as husband and wife. Said a learned judge: "Where persons live together as man and wife, their declarations are for the most part given in evidence; and, if these declarations be contradictory, it will of course create doubt, and must be left to the jury to determine."[4] And in a Louisiana case it was even considered, that, under some circumstances, the declaration of the parties disclaiming marriage may outweigh the evidence by cohabitation and repute.[5] In Mississippi, the declarations of a deceased person, whose marriage was in dispute, to the effect that her former husband was dead, were deemed admissible, for the purpose of showing the validity of her second marriage.[6]

§ 542. *Judicial Records, &c.: —*

May prove Marriage. — A marriage likewise may be proved by the record of a judicial proceeding sustaining it; but this is a matter somewhat illustrated in a subsequent division of this work.[7] Possibly the reader who is pursuing minute inquiries may find something of interest on this subject of the proof of marriage in the cases here cited in a note.[8]

[1] Morgan *v.* Purnell, 4 Hawks, 95; Shrewsbury Peerage Case, 7 H. L. Cas. 1. See Abington *v.* North Bridgewater, 23 Pick. 170.

[2] Westfield *v.* Warren, supra.

[3] Cole *v.* Langley, 14 La. An. 770.

[4] Colcock, J. in Allen *v.* Hall, 2 Nott & McC. 114.

[5] Philbrick *v.* Spangler, 15 La. An. 46.

[6] Spears *v.* Burton, 31 Missis. 547.

[7] And see Sellman *v.* Bowen, 8 Gill & J. 50, 54; Muirhead *v.* Muirhead, 23 Missis. 97; Pegram *v.* Isabell, 2 Hen. & Munf. 193; Vol. II. § 742 et seq.

[8] Batthews *v.* Galindo, 4 Bing. 610, 3 Car. & P. 238; Martin *v.* Martin, 22 Ala. 86; Reg. *v.* Orgill, 9 Car. & P. 80; Reg. *v.* Bowen, 2 Car. & K. 227; Rex

§ 543. *Statutes changing the Common-law Evidence: —* **Fact of Marriage — Polygamy — Crim. Con. — Common-law Rules.** — In a New Hampshire case, Parker, C. J., observed: "Were not the authorities so strong it might be questioned whether this evidence of cohabitation and reputation ought not to be admitted in cases of *crim. con.* and in prosecutions for adultery and bigamy, for the simple reason that it has a legitimate tendency to prove the fact. If larceny and robbery and murder may be proved by circumstantial evidence, the inquiry naturally arises why cases of *crim. con.* &c. may not be so also. It is very clear that they may, except in the matter of proof of the marriage. And it is not easy to perceive why an exception should be made in favor of defendants in such cases. If they have nothing better to rely upon for a defence than the non-existence of a marriage, they certainly could not complain of being put to show it, after *prima facie* evidence had been adduced on the other side."[1] The reader perceives that the learned judge assumes, in this extract, the law of the subject to be in some respects unlike what, in the foregoing chapters of this work, it has been laid down as being. But whatever be the correct common-law doctrine, since there is possibly some room for doubt in regard to it, perhaps legislation, which in some of our States has interposed, did not unwisely in so doing.

§ 544. **Massachusetts Statute.** — Thus, in Massachusetts, a statute was passed in 1840, and still further extended in its provisions in 1841, now reduced, in the General Statutes, to the following form: "When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the party against whom the process is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent."[2] Where, under this statute, general repute is relied upon, the repute need not necessarily come from members of the family of the person whose marriage is in question: it is sufficient coming from any

v. Hassall, 2 Car. & P. 434; Reg. *v.* Woodward, 8 Car. & P. 561; Pegram *v.* Isabell, 2 Hen. & Munf. 193.

[1] Young *v.* Foster, 14 N. H. 114, 119.

[2] Mass. Gen. Stat. c. 106, § 22.

other persons who know the circumstances.[1] And repute in a foreign country may be received on the question of a foreign marriage.[2] How far this statute, and statutes like this in other States, have operated to change the common law, is a question the answer to which will depend mainly upon the opinion of the person answering, as to what the common law is. But plainly such statutory provisions should not be construed to annul, in this matter of marriage, the doctrines of legal presumption, of presumption of fact, and the like, which have been discussed in the foregoing chapter. The reader should note that this Massachusetts statute makes the evidence to which it points, "competent," yet nothing more. Still it must remain true, that what would prove a marriage on an issue of dower will not necessarily prove it on an indictment for polygamy. "Statutes in derogation of the common law, or of a previous express enactment, are to be construed strictly; not operating beyond their words, or the clear repugnance of their provisions; that is, the new displaces the old only as directly and irreconcilably opposed in terms."[3] This view, originally expressed here, has been confirmed by adjudication; for, as elsewhere observed,[4] "the statute does not annul the prior legal presumptions against the first marriage [on a criminal trial for polygamy], and in spite of the statute the proof of the first marriage in a polygamy case differs from the proof of it in most civil causes."

§ 545. **General Caution.** — We have not adjudications sufficient to enable an author to enter upon an exposition, at large, of this class of enactments. But the practitioner is cautioned here, that, if he goes into his case with proof wholly inadequate at the common law, relying upon the statute, he may perhaps encounter an adversary who will show to the judge and jury a beauty and harmony in the common-law doctrines, which, as properly understood, are not varied by a statute, justly interpreted, the obvious intent whereof, on its face, was principally to remove the mist which ill-considered dicta of judges had cast

[1] Knower *v.* Wesson, 13 Met. 143.
[2] Commonwealth *v.* Johnson, 10 Allen, 196.
[3] Bishop Stat. Crimes, § 155.
[4] Bishop Stat. Crimes, § 609.

around this subject. At the same time, there can be no doubt that the Massachusetts statute, for example, has in some degree wrought a change in the law of the evidence by which marriage is proved.

CHAPTER XXX.

SOME REMAINING QUESTIONS AS TO THE PROOF OF LEGITIMACY.

§ 546. **Legitimacy as depending on Marriage — Actual Paternity.** — The principal question, in most issues of legitimacy, is, whether or not the alleged parents were married. And in determining this question, the rules of the evidence of marriage, as laid down in the foregoing chapters, will be found available. Then, if the child was born of a married woman, the law presumes the husband to have been the father of the child, in which case, the child is legitimate; but, if the husband was not the father, the child is illegitimate, — a point discussed, as to the evidence, in some preceding sections.[1] There was a time when the common law as held in England maintained, that, if a child was begotten while the father was within the four seas, "that is," as Lord Coke explains, "within the jurisdiction of the King of England," its legitimacy was a conclusion of law, not permissible to be rebutted by any evidence, "unless," adds Lord Coke, "the husband hath an apparent impossibility of procreation."[2] But this estoppel, if it may be so called, of the common law, was soon removed by adjudication, so that the fact of each case may be made to appear; yet we saw, in the former sections already referred to, that the law is still very strict in presuming legitimacy.[3]

§ 547. **Husband and Wife as Witnesses — Their Confessions.** — We saw also in a previous section,[4] that, as a general proposition, a husband or wife may be a witness, in behalf of a third

[1] Ante, § 447–449.
[2] Co. Litt. 244 *a*.
[3] Barony of Saye & Sele, 1 H. L. Cas. 507.
[4] Ante, § 494.

person, to prove or disprove the asserted marriage. And within this rule, where the question is whether certain parties are legitimate or not, the parents, either father or mother, or both, may be brought forward to testify whether or not they were lawfully married.[1] But on "the broad ground of general public policy, affecting the children born during the marriage, as well as the parties themselves,"[2] the courts refuse to permit, on the issue of legitimacy or illegitimacy, the married parties, or one of them after the death of the other, to testify whether or not they had carnal access to each other during the period within which the child must have been begotten.[3] On the other hand, however, the mother of a child, though she may not testify to the non-access of her husband, is receivable as a witness to the fact that another man, not her husband, had access to her.[4] Lord Hardwicke stated the doctrine as follows: "The wife is not a competent evidence in point of law in this case; that is, to prove the whole fact; though it seems she may be a competent witness to prove the criminal conversation between the defendant and herself, by reason of the nature of the fact, which is usually carried on with such secrecy that it will admit of no other evidence; therefore, as to the fact of the defendant's conversation with her, she may be a good witness; but this is only from the necessity of the thing. But then, in the present case, it is gone further; for the wife is the only evidence to prove the absence and want of access of her husband, whereas this might be made appear by other witnesses, and therefore the wife shall not be admitted to prove it, since there is no necessity that can justify her being an evidence in this case. . . . . It must be of very dangerous consequence to lay it down in general, that a wife should be a sufficient sole evidence to bastardize her child, and to discharge her husband of the burden of his maintenance."[5] *A fortiori*, therefore, a mere denial of legitimacy, made by the supposed father, when not under oath, cannot be received in evidence against the legitimacy;[6] though such testi-

[1] Rex *v.* Bramley, 6 T. R. 330; Standen *v.* Standen, Peake, 32; Rex *v.* St. Peter's, Bur. Set. Cas. 25.

[2] Rex *v.* Kea, 11 East, 132.

[3] Rex *v.* Reading, Cas. temp. Hardw. 79; Patchett *v.* Holgate, 3 Eng. L. & Eq. 100, 15 Jur. 308.

[4] Rex *v.* Rook, 1 Wils. 340.

[5] Rex *v.* Reading, supra, p. 82, 83.

[6] Bowles *v.* Bingham, 2 Munf. 442. And see The State *v.* Watters, 3 Ire. 455.

mony seems to have been deemed admissible, under special circumstances, in its favor.[1]

§ 548. **Child begotten before Marriage and born after — Marriage after Birth.** — Upon a point already somewhat discussed in these pages,[2] Mr. Best observes: "It is a *præsumptio juris et de jure*, that a child born after wedlock, of which the mother was even visibly pregnant at the time of the marriage, must be taken to be the offspring of the husband."[3] Yet if the woman, though pregnant, was not visibly so, this has a material influence upon the case, the extent of which is not perhaps accurately defined.[4] Under the civil law, and by the statutes of some of our States, a marriage of the parents subsequently to the birth of a child renders it legitimate;[5] but such a child cannot take, as legitimate, real estate situated in another State or country where a different rule as to legitimacy is established.[6] Said Lord Brougham: "In deciding upon the title to real estate, the *lex loci rei sitæ* must always prevail; so that a person legitimate by the law of his birthplace, and of the place where his parents were married, may not be regarded as legitimate to take real estate by inheritance elsewhere."[7] And upon this principle there is reason to presume, that, under some circumstances, such as possibly those which attended the case wherein these observations fell from this learned lord, a foreign marriage might be held to be void upon the issue of legitimacy, yet good upon other ordinary issues.

§ 549. **Conclusion.** — There are, connected with this subject of legitimacy, some other questions which it might be interesting to discuss; but they are so far alien to the main purpose of this work, that it is deemed best this chapter should close here.

[1] Kenyon *v.* Ashbridge, 11 Casey, 157. See, as to Louisiana, Dejol *v.* Johnson, 12 La. An. 853. See also Bennett *v.* Toler, 15 Grat. 588.

[2] Ante, § 187.

[3] Best Ev. 2d Lond. ed. 417.

[4] Baker *v.* Baker, 13 Cal. 87, and cases there cited; Stegall *v.* Stegall, 2 Brock. 256; Kleinert *v.* Ehlers, 2 Wright, Pa. 439; Page *v.* Dennison, 1 Grant, 377, 5 Casey, 420; Phillips *v.* Allen, 2 Allen, 453.

[5] Carroll *v.* Carroll, 20 Texas, 731; Ash *v.* Way, 2 Grat. 203; Hunter *v.* Whitworth, 9 Ala. 965.

[6] Smith *v.* Derr, 10 Casey, 126; Doe *v.* Vardill, 5 B. & C. 438, 6 Bing. N. C. 385; Birthwhistle *v.* Vardill, 7 Cl. & F. 895, s. c.

[7] Fenton *v.* Livingstone, 3 Macq. Scotch Ap. Cas. 497, 532.

BOOK V.

SEPARATIONS WITHOUT JUDICIAL SENTENCE.

CHAPTER XXXI.

THE GENERAL DUTY OF THE HUSBAND TO SUPPORT THE WIFE IN COHABITATION.

§ 550. **Duty of Cohabitation.** — When parties are legally married, it is in a certain sense their legal duty to dwell together as husband and wife. If they do not, and if they live in England, they may be compelled by judicial process, as we have already seen,[1] to come together. This is a proceeding which the laws of none of our States have hitherto authorized; yet we have plainly inherited the English law to the extent, that it is a thing contrary to the policy of our law, and not to be encouraged by the courts, for married persons to live apart, otherwise than under the authority of a judicial decree.

§ 551. **Sometimes Separation justifiable.** — Yet as separations do occur without judicial sentence, it becomes important to ascertain by what rules of law such separations are regulated. There are circumstances in which it becomes necessary for a husband to be absent, without his wife, from the matrimonial dwelling. This is not a desertion of his wife; it is no wrongful act of his; and her remaining behind is no wrongful act of hers. The relations of the parties to each other are not, therefore, essentially different from what they would be if he continued his presence at the matrimonial habitation.

§ 552. **Husband's Absence, Provision for Wife.** — Yet, should a husband thus go away, and forbid all persons to have any deal-

[1] Ante, § 29.

ings with his wife, or with him through her as his agent; and should he also fail to make any suitable provision for her otherwise; this would be a case of wrong on his part, — perhaps he would not be in the wrong in going, for business might call him; but the case would, at least, be the common one of the husband's refusing to furnish his wife with necessaries. What, therefore, is the law on this subject of necessaries?

§ 553. **Husband's Duty to furnish Necessaries.** — When a man marries a woman, he places himself by the marriage under obligation to support her; and nothing but wrongful conduct on her part can free him from the obligation.[1] If he fails to provide her with suitable and proper sustenance, — such sustenance as, considering his rank and fortune, a jury under instructions from the court shall deem to be suitable and proper, — any third person who furnishes the sustenance to her may maintain against him an action at law for the same.[2] And the obligation to pay for necessaries furnished to the wife binds the husband who is a minor, the same as him who is of full age.[3] If, on the other hand, he makes suitable provision for her, the husband is not liable when she, without his approbation, expressed or implied, undertakes to pledge his credit, though for what otherwise might be deemed necessaries.[4] It is not proposed to discuss here, in any minute way, the question, — What are necessaries for a wife? because this question belongs quite as much to other departments of our law as to the particular one which is embraced in these volumes.

§ 554. **Continued. — What are Necessaries — Distinguished from Alimony.** — It may however be observed, in general terms, that the wife is entitled absolutely to as much food and clothing as are required to preserve her life and health; and, of course, entitled to suitable medical care and nursing when she is sick. And perhaps this may be deemed to be the extent, or nearly so, of that absolute claim which every wife, under every

[1] 1 Bishop Mar. Women, § 49, 58, 887, 892.

[2] Johnson *v.* Sumner, 3 H. & N. 261; Atkins *v.* Curwood, 7 Car. & P. 756; Shelton *v.* Pendleton, 18 Conn. 417; Montague *v.* Benedict, 3 B. & C. 631; Lane *v.* Ironmonger, 13 M. & W. 368; Gilman *v.* Andrus, 28 Vt. 241; Monroe *v.* Budlong, 51 Barb. 493; Keller *v.* Phillips, 39 N. Y. 351.

[3] Cantine *v.* Phillips, 5 Harring. Del. 428.

[4] Holt *v.* Brien, 4 B. & Ald. 252; Seaton *v.* Benedict, 5 Bing. 28.

possible contingency, may make upon her husband, irrespective of his ability and standing in society, under the general name of necessaries. There are, however, but few husbands in our country so poor and so low that they are not able, and should not be required, to do better by their wives than this. Yet it is impossible for speech to lay down an absolute rule, indicating just how much, in each case, the husband ought to do pecuniarily for his wife; and, were such a rule laid down, it might not correctly indicate that provision which the law means when it uses the technical term *necessaries*. We shall see, in subsequent chapters of these volumes, that, when a wife obtains a divorce from her husband for his fault, she is awarded alimony for her support, according to the ability and standing of the husband; yet the alimony there to be treated of is a different thing from the necessaries spoken of here, which latter are also, like the alimony, to be furnished, in some measure, in a profusion or scantiness according with the husband's ability and standing. Alimony is payable in money; and the wife takes it and spends it, or keeps it, as she will: necessaries consist of goods and other needful things delivered to the wife for her use. Here is a point of difference between alimony and necessaries. And, in general, we may say, that necessaries are such articles of food, or apparel, or medicine, or such medical attendance or nursing, or such provided means of locomotion, or provided habitation and furniture, or such provision for her protection in society, and the like, as the husband, considering his ability and standing, ought to furnish to his wife for her sustenance, and the preservation of her health and her comfort. It is not proposed to expand this definition; but, in a note, the reader is referred to some authorities which he can consult at his leisure.[1] And in a subsequent division of

[1] Manby *v.* Scott, 2 Smith Lead. Cas. 245 and note; 2 Bright, Hus. & Wife, 5 et seq.; Dyer *v.* East, 1 Vent. 42, 1 Mod. 9; 1 Selw. N. P. Phil. ed. of 1844, 714 et seq.; 1 Steph. N. P. 718 et seq.; Garbrand *v.* Allen, Comb. 450; Morton *v.* Withens, Skin. 348; Seaton *v.* Benedict, 5 Bing. 28; Montague *v.* Baron, 5 D. & R. 532; Montague *v.* Benedict, 3 B. & C. 631, s. c.; Montague *v.* Espinasse, 1 Car. & P. 356, 502, s. c.; Atkins *v.* Curwood, 7 Car. & P. 756; Clifford *v.* Laton, 3 Car. & P. 15, Moody & M. 101; Hunt *v.* Blaquiere, 3 M. & P. 108, 5 Bing. 550; Reeve *v.* Conyngham, 2 Car. & K. 444; Read *v.* Legard, 6 Exch. 636, 15 Jur. 494, 4 Eng. L. & Eq. 523; Lane *v.* Ironmonger, 13 M. & W. 368; Harris *v.* Lee, 1 P. Wms. 482; Anonymous,

this work, he will find discussed the question of the wife's power to bind her husband to pay her counsel fees and other like expenses, when she sues him for a divorce, or proceeds against him for a breach of the peace, and other similar matters.[1]

§ 555. **Husband's Right to manage Expenditures — Forbidding Tradesman.** — When the parties are living together as husband and wife in actual cohabitation, the husband is the head of the family; and, if he chooses to take the matter of providing for the family into his own hands, and exclude his wife from all share therein, he has the right in law to do so. And there are

2 Show. 132; Dennys *v.* Sargeant, 6 Car. & P. 419; Etherington *v.* Parrot, 2 Ld. Raym. 1006, 1 Salk. 118; Cany *v.* Patton, 2 Ashm. 140; Shelton *v.* Hoadley, 15 Conn. 535; Black *v.* Bryan, 18 Texas, 453; McClallen *v.* Adams, 19 Pick. 332; Zeigler *v.* David, 23 Ala. 127. In Breinig *v.* Meitzler, 11 Harris, Pa. 156, 160, Black, C. J. observed: "What would be extravagant in one man's wife might be very economical in another. The best way to determine what articles of dress a discarded wife may supply herself with at the expense of her husband, is to ascertain what a prudent woman would expect, and a good husband would be willing to furnish, if the parties were living harmoniously together. This would depend on a variety of circumstances, and on the value of the husband's estate among others. The short as well as the fair way of dealing with such a question is to call a witness who knows the circumstances, style of living, and social position of the husband and his family." In Wood *v.* O'Kelley, 8 Cush. 406, it was held that a husband is not liable, as for necessaries, to pay the bill of a clairvoyant doctor, whom the wife may choose to consult, in a case of illness; though, in general terms, he is liable for medicines and medical attendance furnished a sick wife. But, said the learned judge: "The law does not recognize the dreams, visions, or revelations of a woman in a mesmeric sleep as necessaries for a wife, for which the husband, without his consent, can be held to pay. These are fancy articles, which those who have money of their own to dispose of may purchase, if they think proper, but they are not necessaries, known to the law, for which the wife can pledge the credit of her absent husband." p. 408. Now, upon principle, when a husband is present he may perhaps have the authority to determine by what physician she shall be attended, and according to what school of medicine the prescriptions for her shall be written; I say, perhaps, for, though such an exercise of despotism, in a case where the wife is of competent understanding to judge for herself, is not to be commended, we have probably no decisions showing it not to be in the husband's legal power. But when he is away, having made no special provision for the emergency, surely she is to select. Assuming, then, that a clairvoyant physician is an impostor, if among doctors not of this sort there are, in our country, diverse and conflicting schools of physic and of doctrine, and each school tells us the others are sheer impositions upon the public, shall judges and jurors compel litigants to patronize the same school of medicine which they do themselves? If not, who shall tell at what point of public odium the man who starts a new style of medical practice must stand, to be an *unnecessary* doctor in distinction from a *necessary* one?

[1] Vol. II. § 388–392.

authorities which seem to indicate, that, in such a case, if he expressly forbids a tradesman to let his wife have any thing on his account, this prohibition is absolute and unqualified in its effect; and, though the husband should not furnish his wife even with necessaries most indispensable to her, still she cannot pledge to the tradesman his credit for them.[1] Lord Raymond reports Lord Holt to have said: "The husband is only liable upon account of his own assent to the contracts of his wife [for necessaries], of which assent cohabitation causes a presumption; and, when he has declared the contrary, there is no longer room for such a presumption. For the wife has no power originally to charge her husband, but is absolutely under his power and government, and must be content with what he provides; and, if he does not provide necessaries, her remedy is in the spiritual court."[2] But this observation was, at best, only a dictum of the very learned and profound judge; for, in the facts of the case, the wife was a drunken, spending woman, who used to pawn her clothes for drink, and the husband had made other and sufficient provision for her, and the goods were furnished against his caution to the contrary. And as to this dictum, the better reporter Salkeld puts it in a milder way.[3] And there is believed to be no authority, other than dicta worthy of little regard, and observations of perhaps respectable writers, for the doctrine which would compel a wife to go without food or clothes if her husband so ordered, instead of permitting her to pledge his credit for them, unless she were also willing to withdraw from the cohabitation and represent that he had turned her out of doors.[4]

§ 556. **Wife's Presumed Authority.** — Moreover, inasmuch as it is essential to the comfortable living together of husband and wife, and customary in all communities, for the husband to permit the wife to have some management over the household affairs and household expenses, there is a degree to which her authority to bind him must, in the absence of any specific proof on the subject, be presumed. And the doctrine seems to be,

[1] 1 Selw. N. P. 292; Etherington *v.* Parrot, 1 Salk. 118, 2 Ld. Raym. 1006; Boulton *v.* Prentice, 1 Selw. N. P. 298.

[2] Etherington *v.* Parrot, 2 Ld. Raym. 1006.

[3] 1 Salk. 118.

[4] And see Hughes *v.* Chadwick, 6 Ala. 651.

though the individual cases are composed so much of special facts as not to render the point entirely clear, that in the language of Bayley, J., "Cohabitation is presumptive evidence of the assent of the husband" to being bound by the wife's contract for "necessaries"[1] for herself and family, but nothing more.[2] And by the word "necessaries," as here used, is perhaps meant, those things which are *prima facie* such, not taking into the account the matter of the husband's supplying, or failing to supply, the things in sufficient profusion, by his own personal order;[3] yet, if she obtains an over-supply, whether from one trader or many, the agency will not be presumed.[4] "I take the law," said Lord Abinger, C. B., "with respect to husband and wife, to be this: Where a wife is living with her husband, and where, in the ordinary arrangements of her husband's household, she gives orders to a tradesman for the benefit of her husband and family, and these orders are proper and not extravagant, it is presumed that she has the authority of her husband for so doing. This rule is founded on common sense; for a wife would be of little use to her husband in their domestic arrangements, if she could not order such things as are proper for the use of a house, and for her own use, without the interference of her husband. The law, therefore, presumes that she does this by her husband's authority."[5] Yet still, if the husband notifies the tradesman not to deal with the wife on his account, this fact reverses the presumption; and, in this case, he is not liable, even for necessaries, on the ground that he has authorized their purchase; though, if he does not furnish them otherwise, he is liable on the ground mentioned in earlier sections of this chapter.

§ 557. **How in General, when living Separate.** — But, con-

[1] Montague *v.* Benedict, 3 B. & C. 631, 635.

[2] "If a man and his wife live together, it matters not what private agreement they may make, the wife has all usual authority of a wife." Pollock, C. B. in Johnston *v.* Sumner, 3 H. & N. 261, 266; S. P. Ruddock *v.* Marsh, 38 Eng. L. & Eq. 515, 1 H. & N. 601. And see Etherington *v.* Parrot, cited and commented on in the last section; Lane *v.* Ironmonger, 13 M. &. W. 368; Green *v.* Sperry, 16 Vt. 390; Shelton *v.* Hoadley, 15 Conn. 535; Furlong *v.* Hysom, 35 Maine, 332; Fredd *v.* Eves, 4 Harring. Del. 385.

[3] Ruddock *v.* Marsh, supra.

[4] Lane *v.* Ironmonger, supra; Atkins *v.* Curwood, 7 Car. & P. 756. And see Reneaux *v.* Teakle, 8 Exch. 680, 20 Eng. L. & Eq. 345.

[5] Emmett *v.* Norton, 8 Car. & P. 506, 510.

tinues Lord Abinger, "where the husband and wife are separated from each other, and do not live in the same house, new considerations arise."[1] It is to these new considerations that we are to direct our attention through some remaining chapters.

§ 558. **Husband's presumed Consent distinguished from Compulsory Duty — Accepting Benefit of a Purchase.** — And the reader should bear in mind, that we have thus far brought to view two separate grounds upon which, in different cases and circumstances, the husband is made liable for debts contracted by the wife; the one is, that he is bound in law to support her, and, if he fails to do this duty, a third person may step in and do it for him, to the extent of furnishing her with what are termed necessaries, and compel him to pay the bill. The other ground, quite unlike this, is that of agency; he is presumed, without specific proof, to constitute her his agent, to a limited extent; and, beyond this, he can, if he chooses, make her his agent to precisely the same extent as he can any other person; but the further degree of agency, in order for him to be charged by reason of it, must appear developed in the facts of the particular case, or be otherwise shown in the proof. Still a third ground of liability will appear in another chapter; namely, that he has voluntarily accepted a benefit from the credit given him through the wife. Yet, dissimilar as these three grounds seem to be, they are still traceable to the one foundation principle, agency. Under the circumstances last mentioned, the husband, in a sense, ratifies the assumed agency of the wife; in the first-mentioned circumstances, the law, at the marriage, made her his agent for the purchase of such necessaries as he might refuse to supply, and left him no authority to withdraw the agency.[2]

[1] Emmett *v.* Norton, 8 Car. & P. 506.

[2] See, on the subject of this section, and the last, Gray *v.* Otis, 11 Vt. 628; Green *v.* Sperry, 16 Vt. 390; Benjamin *v.* Benjamin, 15 Conn. 347; Mackinley *v.* McGregor, 3 Wharf. 369; Abbott *v.* Mackinley, 2 Miles, 220; Cox *v.* Hoffman, 4 Dev. & Bat. 180; Shelton *v.* Pendleton, 18 Conn. 417; Mulford *v.* Young, 6 Ohio, 294; Minard *v.* Mead, 7 Wend. 68; Dacy *v.* New York Chemical Manufacturing Co., 2 Hall, 550; Spencer *v.* Tisue, Addison, 316; Shoemaker *v.* Kunkle, 5 Watts, 107; Webster *v.* McGinnis, 5 Binn. 235; Cany *v.* Patton, 2 Ashm. 140; Wray *v.* Cox, 24 Ala. 337; Sawyer *v.* Cutting, 23 Vt. 486; Gill *v.* Read, 5 R. I. 343; Reese *v.* Chilton, 26 Misso. 598; Krebs *v.*

CHAPTER XXXII.

THE HUSBAND'S LAWFUL TEMPORARY ABSENCE FROM THE COMMON HABITATION.

§ 559. **Distinguished from turning Wife away.** — If a husband should separate himself from his wife, whether temporarily or permanently, and forbid all persons to harbor or trust her on his account, and furnish her nothing himself wherewith to feed, clothe, or shelter her, this would be a case of turning her out of doors; the separation would be through his fault, even though the calls of business or of patriotism required him to be absent for a time, and it would not be such a separation as is to be treated of in the present chapter. All the cases, therefore, in which the husband forbids a credit to be given to his wife, and at the same time leaves her destitute, will be deferred for consideration in our next chapter.

§ 560. **Husband forbidding Tradesman.** — Still, if a man, for a temporary, lawful purpose, leaves the common matrimonial habitation, and leaves his wife there, it is legally within his power, and in some extreme circumstances morally so, to forbid, after he has made ample provision for her wants, all persons, or any particular person, from furnishing her a credit on his account.[1] "The defendant," observed Sutherland, J., in a New York case, "living separate from his family," — and the considerations are the same where the separation is but for some lawful, temporary purpose, as where it is permanent, — "was undoubtedly bound to furnish them with necessaries suitable to their condition, and his omission to do so would furnish them with a general credit to that extent; but he has a right to supply them in such reasonable manner as he may think proper; he can employ such mechanics and storekeepers

O'Grady, 23 Ala. 726; Casteel *v.* Casteel, 8 Blackf. 240; Read *v.* Legard, 4 Eng. L. & Eq. 523, 6 Exch. 636.

[1] Holt *v.* Brien, 4 B. & Ald. 252. And see Reneaux *v.* Teakle, 8 Exch. 680, 20 Eng. L. & Eq. 345.

as he chooses, and can prohibit all others from giving them credit on his account." [1]

§ 561. **No Express Prohibition — Wife's Presumed Agency.** — But on the ground of presumed agency,[2] if a husband leaves for a temporary purpose the matrimonial habitation, and leaves house and effects in the care of his wife, there is a presumption, the precise extent of which varies with the circumstances, and is not well defined in the law, that she has authority to deal with such property, and to pledge his credit, — how far? Let us see. In an Alabama case, it appeared that a husband, who was a baker, had gone temporarily to California, leaving his wife and bakery behind; and she had carried on the bakery in her own name, and finally had sold some of the furniture and fixtures, taking therefor notes payable to herself, which notes she afterward transferred in discharge of a debt contracted by her about this business. And the court held, that these circumstances did not create a presumption, in law, of authority in the wife to transfer the notes; yet that the jury might determine, whether or not, as a question of fact, this conclusion of authority should be drawn from the evidence. Said Goldthwaite, J.: "The wife, in the absence of the husband, may have a general authority to exercise the usual and ordinary control over the property left in her possession by him, which must be controlled by some one; unless the presumption of this authority is rebutted by proof that he had constituted some other person his agent for that purpose.[3] But the sale of the husband's effects may be outside of the usual and ordinary control of them; and whether it is so or not must depend upon the nature of the property, the length of the absence, and perhaps other circumstances. If the husband went to California, leaving the wife to carry on his plantation during his absence, it would not follow, as a presumption of law, that he had given her authority to sell and dispose of his slaves, and transfer the notes received in payment for them. So in the present case,

[1] Kimball *v.* Keyes, 11 Wend. 33, 34. And see Morgan *v.* Hughes, 20 Texas, 141; Harshaw *v.* Merryman, 18 Misso. 106; Mott *v.* Comstock, 8 Wend. 544.

[2] And see post, § 613 et seq.

[3] Referring to Church *v.* Landers, 10 Wend. 79.

although the husband may have consented that his wife might carry on the business of the bakery in her separate name, that fact does not create a legal presumption that she was authorized to transfer the notes received from the sale of the fixtures, which in law were payable to her husband; and that they were transferred in payment of a debt contracted by her in the course of the separate business can have no influence. The question is purely one of authority, so far as she is concerned."[1] There are still other cases which tend somewhat toward this view of the law.[2]

§ 562. **Wife's Presumed Agency, continued.** — There is a Connecticut case in which the doctrine appears to have been laid down, that, where a husband goes temporarily away from home, leaving his family and effects behind, the wife shall be presumed to have over the effects such control and power of disposition as is usual for wives to have in like circumstances; also, the full authority which any other agent left in charge of the effects, with the business connected therewith, would under the general law of agency possess. In applying this doctrine to the facts of the case, the court adjudged, that, when the husband went temporarily to one of the southern States, leaving his affairs in the hands of no person other than his wife; and a creditor of the husband attached some standing grass to secure the debt, and the wife thereupon gave permission to the creditor to cut and sell this grass in discharge of the debt, which was accordingly done, this permission given by the wife was an act in excess of her authority, it falling neither within what is customary for wives, nor what the law of agency gives to the agent in like circumstances; and, consequently, that the creditor, in cutting and selling the grass, committed a trespass against the husband.[3] And there are various other cases which, with more or less distinctness, lend strength to this general doctrine.[4] In a later Connecticut case it was held, that the wife, merely as such, has no power to revoke the husband's

[1] Krebs *v.* O'Grady, 23 Ala. 726, 732.

[2] Casteel *v.* Casteel, 8 Blackf. 240; Chamberlain *v.* Davis, 33 N. H. 121.

[3] Benjamin *v.* Benjamin, 15 Conn. 347.

[4] Cox *v.* Hoffman, 4 Dev. & Bat. 180; Webster *v.* McGinnis, 5 Binn. 235; Ruddock *v.* Marsh, 38 Eng. L. & Eq. 515, 1 H. & N. 601; Sawyer *v.* Cutting, 23 Vt. 486; Alexander *v.* Miller, 4 Harris, Pa. 215.

license to a third person to enter on his land. And where a husband, on going from home, gave his wife authority to forbid all persons entering on the land to hunt, a license previously given was deemed not to be revoked by the wife's simply forbidding the person to hunt upon the land, where she did not state her authority, and nothing appeared showing authority except the mere fact of her being the wife. Said McCurdy, J.: "*Her act* would not of itself convey any intimation of the *will of her husband.* The defendant might well suppose that of her own motion she repelled the intolerable nuisance of a gunner around her house, or that with the sympathies of a true woman she preferred the presence of the birds to that of their destroyer." [1]

§ 563. **Continued.** — In Vermont, on facts nearly identical with those involved in the former of the two Connecticut cases stated in the last section, a directly opposite result was reached. And the learned judges laid down the rule to be, that, where the husband is absent many months from the country, leaving behind, upon his farm, a family consisting of wife and minor sons, the wife is to be deemed the head of the family, with authority, as his agent, over all such ordinary business as may arise; also, in the language of Redfield, J., over "any such extraordinary occurrences as it might be anticipated would sometimes occur;" her acts, as his agent in these matters, being binding upon him.[2]

§ 564. **Continued — How in Principle.** — If we consult those general principles which the law has provided as the guides to our reason, we shall arrive at the following conclusions respecting this matter upon which judicial opinion seems to be not altogether harmonious. When a man who is on terms of cohabitation with his wife absents himself temporarily from his home, at the call of business, or for some other lawful purpose, he should be presumed, in the absence of special circumstances, to intend neither that his business at home shall stand still, nor that his household shall starve. If, therefore, he commits, in such a case, his affairs to the care of no third person, and leaves behind no third person within whose ordinary

[1] Kellogg *v.* Robinson, 32 Conn. 335, 341.

[2] Felker *v.* Emerson, 16 Vt. 653.

duties as his agent or servant the oversight of his business lies, it must be presumed that he intended it should be overseen by his wife, at least as far as such oversight is necessary to prevent loss, either from the cessation of business, or from its wrongful or utterly reckless conduct. While he remained at home, the division of cares between himself and her might have left her entirely unoccupied about those particular things in which women do not generally concern themselves, yet even then her interests were in a sense one with his in respect to them; and, on his going away, not only these interests remain, but the husband, who in ordinary circumstances guards his wife's interests in his own person, is not present as before to protect them, therefore the wife becomes the natural and proper person to do for herself what ordinarily the husband does for her. And although it is in the power of the husband, when he absents himself, to place his own affairs in what hands he chooses, and the care of them carries with it in a certain sense the care over the interests of the wife, yet, neglecting to appoint any third person, he must intend that she whose identity is in law merged in his should stand as his agent for the common good. There is no alternative between this supposition and the violent and inadmissible one, that he left his own interests and his family's to perish together. Yet this would not justify the wife, during his absence, in entering upon new enterprises; or, in ordinary exigencies, making sale of his fixed property; or doing those things which particularly require the personal superintendence of the husband. It would, however, justify her in making a sale to prevent a serious loss, and the like. And in the one class of cases the husband should be bound by her acts; in the other, not. When a case of this sort comes before a judicial tribunal, the judge should lay down to the jury these general principles of law, together with any special suggestions which might grow out of the particular facts; and then the jury should decide, whether, in the particular case, the agency ought to be inferred. Of course, if the particular matter were one usually intrusted to wives, this would furnish independent ground on which the inference of agency might rest.

§ 565. **Insanity of Husband or Wife.** — If the husband or the

wife is insane, the obligation of the husband to support his wife remains, whether he or she is the one on whom the insanity has fallen. If she is in an insane asylum, the duty rests on him to maintain her there,[1] and he may be sued for necessaries there furnished her;[2] if he is in the asylum, she may pledge his credit for necessaries while he there remains.[3] Indeed the general doctrine is, that, in all cases where the separation of husband and wife is without her fault, he is liable to any third person who furnishes her with necessaries during the separation.[4] And when she dies, in his absence, a third person who provides burial for her, suitable to her husband's rank and fortune, may recover the expenses of the husband.[5]

§ 566. **Continued.** — In Pennsylvania it was held, that the authority of a wife to pledge the credit of her insane husband does not include the general right to manage his affairs; consequently she cannot transfer his property to a particular creditor in payment of a debt to the prejudice of others.[6] The Indiana tribunal has also decided, that the husband cannot be made to pay for support furnished to his wife in a poor-house; for, if she was a proper subject to be committed there, no person is so liable; if she was not, the receiving of her by the overseers of the poor was a wrongful act.[7] No reason occurs to the author for objecting to this Pennsylvania decision; but, as for the Indiana one, while it is doubtless correct under the statutes and jurisprudence of the State, there are other States of our Union, in which plainly the opposite result would be reached; or, at least, in which the doctrine would be much qualified. In Maine, therefore, it has been held, that, where a husband, well able to support his wife who is insane, neg-

[1] Wray *v.* Wray, 33 Ala. 187.

[2] Wray *v.* Cox, 24 Ala. 337.

[3] Read *v.* Legard, 4 Eng. L. & Eq. 523, 6 Exch. 636; Alexander *v.* Miller, 4 Harris, Pa. 215; Richardson *v.* Du Bois, Law Rep. 5 Q. B. 51.

[4] Pomeroy *v.* Wells, 8 Paige, 406.

[5] Jenkins *v.* Tucker, 1 H. Bl. 90. This is so even where the wife is living separate from her husband. Ambrose *v.* Kerrison, 4 Eng. L. & Eq. 361, 10 C. B. 776. In a curious case which recently arose in Pennsylvania it was held, that, though any person in whose house a human being dies, is bound to see the corpse buried, yet, after a wife has buried her husband, she has no longer any control over his dead body, but the right of removal is with his next of kin. Wynkoop *v.* Wynkoop, 6 Wright, Pa. 293.

[6] Alexander *v.* Miller, 4 Harris, Pa. 215.

[7] Switzerland *v.* Hilderbrand, 1 Ind. 555, 1 Smith, Ind. 361. And see Norton *v.* Rhodes, 18 Barb. 100.

lects to protect and provide for her, and she wanders into an adjoining town, where she receives support, the expenses of which are paid in the first instance by the town in which she is relieved, and then refunded by the town in which the husband's settlement is, and wherein he resides, — the latter town may recover, against the husband, the expenses thus incurred.[1] These things depend much upon the local law of the particular State.

§ 567. **Wife left in Care of Surgeon.** — Where a husband left his wife, who was sick, in the care of a surgeon at a distance from his home, and the surgeon, after the lapse of a few weeks, performed an operation upon her, soon after which she died, the court held, that he could recover of the husband without proving the operation to be necessary and proper, or notice given by him to the husband, or such a state of facts as to make it dangerous to wait until notice could be given; the burden of proof being on the husband to show the contrary.[2]

CHAPTER XXXIII.

SEPARATIONS THROUGH THE HUSBAND'S FAULT.

§ 568. **General Doctrine — Must furnish Necessaries.** — The views put forth in the last two chapters lead necessarily to the result, that, whenever a husband and his wife are living apart through the fault of the husband, he is under a legal duty to supply her wants, the same as though the cohabitation continued. In other words, he is in these circumstances chargeable for necessaries, which any third person may furnish the wife; unless, still mindful of his duty on this point, he has made for her suitable provision.[3] This doctrine is usually

[1] Alna *v.* Plummer, 4 Greenl. 258. And see Howard *v.* Whetstone, 10 Ohio, 365; Monson *v.* Williams, 6 Gray, 416; Rumney *v.* Keyes, 7 N. H. 571.

[2] McClallen *v.* Adams, 19 Pick. 333.

[3] See Reese *v.* Chilton, 26 Misso. 598; Kemp *v.* Downham, 5 Harring. Del. 417; Rutherford *v.* Coxe, 11 Misso. 347; Emery *v.* Emery, 1 Y. & J. 501, 6 Price, 336; Todd *v.* Stokes, 1 Ld. Raym. 444, 12 Mod. 244; Rumney *v.*

stated to be, that, where the husband abandons his wife,[1] or turns her out of doors,[2] or brings a common prostitute into the house,[3] or treats her with extreme cruelty,[4] or commits adultery,[5] the consequence above mentioned follows.

§ 569. **Wife leaving Husband for Cause — Ground of Divorce — Not Ground.** — The general doctrine on this subject is familiar; and, as laid down in the last section, it is everywhere accepted. But there is room for doubt in a class of cases which have not hitherto received so exact a consideration as they ought. When we come to discuss the question of divorce, we shall see, under the title Desertion, that, if a husband or wife abandons the matrimonial dwelling, the abandoning is not an act of desertion by this party, if the conduct of the other was such as to render the refusal to cohabit legally justifiable. But it is debatable ground whether the one in fault in such a case must have gone so far, in order to justify the other in abandoning the cohabitation, as to lay the foundation for a proceeding for a divorce. And what will be set down in these volumes as the better doctrine is, that the wrong must have proceeded to this extent; in other words, when a husband or wife breaks off cohabitation because of the alleged improper conduct of the other matrimonial partner, such conduct must have proceeded so far as to furnish ground for divorce, or the one so breaking off the cohabitation is guilty of the offence of desertion.[6] Suppose, then, the wife abandons her husband, and undertakes to pledge his credit for necessaries, — must the third person who trusts the husband on the ground of this pledge, and against the husband's consent in fact, prove such wrongful conduct in him as would authorize the wife to carry

Keyes, 7 N. H. 571; Walker *v.* Simpson, 7 Watts & S. 83.

[1] Casteel *v.* Casteel, 8 Blackf. 240; Cunningham *v.* Irwin, 7 S. & R. 247; Breinig *v.* Meitzler, 11 Harris, Pa. 156; Clement *v.* Mattison, 3 Rich. 93; Hall *v.* Weir, 1 Allen, 261; Cartwright *v.* Bate, 1 Allen, 514; McGahay *v.* Williams, 12 Johns. 293; McCutchen *v.* McGahay, 11 Johns. 281; Blowers *v.* Sturtevant, 4 Denio, 46.

[2] Allen *v.* Aldrich, 9 Fost. N. H. 63; Johnston *v.* Sumner, 3 H. & N. 261; Zeigler *v.* David, 23 Ala. 127; Billing *v.* Pilcher, 7 B. Monr. 458; Harris *v.* Morris, 4 Esp. 41.

[3] Tempany *v.* Hakewill, 1 Fost. & F. 438; Descelles *v.* Kadmus, 8 Iowa, 51.

[4] Mayhew *v.* Thayer, 8 Gray, 172; Snover *v.* Blair, 1 Dutcher, 94; Clement *v.* Mattison, supra.

[5] Sykes *v.* Halstead, 1 Sandf. 483; Bennett *v.* Smith, 21 Barb. 439.

[6] Post, § 795 et seq.

on successful proceedings against him for divorce? Plainly he need not go further, — must he go so far? In South Carolina, where no divorces are ever granted, he need not, of course, go so far; but, according to views which to the author of these volumes seem just, in those States where divorces are allowed by law, the judges should presume, in the absence of express legislative declaration to the contrary, that, when the legislative judgment defined the grounds of divorce, it thereby defined the causes for which a wife or husband might lawfully, without the consent of the other party, abandon the matrimonial cohabitation. And if a wife unlawfully leaves her husband, without his consent, she does not, as we shall see in the next chapter, carry with her the husband's credit.

§ 570. **Continued.** — In an early edition of this work, the doctrine was stated thus: It is familiar law that the husband is bound to provide his wife with necessaries, even while she is living apart from him unless she is in fault as to the separation; and that, when he fails to supply her, another person may do it and charge him.[1] But when he does not consent to her going away, the inquiry arises, whether his conduct has been such as to justify her in leaving him, and thus bind him to third persons supplying her. If he is guilty of legal cruelty, clearly he is bound;[2] so doubtless is he, if he has committed any other matrimonial offence, for which the law authorizes a divorce, either from bed and board, or from the bond of matrimony.[3] There is a case in which it was held, that in such circumstances the husband is not to be chargeable, though living in adultery with a common woman, whom he has taken

[1] "When the wife lives separately from her husband without any fault of her own, the law provides, that her husband shall be liable for her adequate maintenance." Lord Ellenborough in Liddlow *v.* Wilmot, 2 Stark. 86. And see Emmett *v.* Norton, 8 Car. & P. 506; and Am. note to 2 Smith Lead. Cas. Am. p. 365, 366; Rumney *v.* Keyes, 7 N. H. 571; Shaw *v.* Thompson, 16 Pick. 198; Read *v.* Legard, 15 Jur. 494, 4 Eng. L. & Eq. 523; 2 Kent Com. 148; Emery *v.* Emery, 1 Y. & J. 501; Allen *v.* Aldrich, 9 Fost. N. H. 63.

[2] Houliston *v.* Smyth, 3 Bing. 127, 2 Car. & P. 22, 10 J. B. Moore, 482; Ayer *v.* Ayer, 16 Pick. 327; Clement *v.* Mattison, 3 Rich. 93; Evans *v.* Fisher, 5 Gilman, 569; Howard *v.* Whetstone, 10 Ohio, 365; Emery *v.* Emery, 1 Y. & J. 501.

[3] See the observations of Lord Mansfield in Ozard *v.* Darnford, 1 Selw. N. P. 11th ed. 294. And see Houliston *v.* Smyth, supra.

into his house;[1] but the doctrine of this case has not been approved of since, the contrary indeed has been ruled,[2] and it is clearly not law either in England[3] or the United States.[4] And there are cases which seem to give color to the idea, that gross immorality and indecent conduct, short of actual adultery, — such as bringing a woman of loose character into the house and placing her at the head of the table, — will justify the wife in leaving her husband. "But still," observed Bronson, C. J., "where there is no such gross indecency on the part of the husband, all the cases agree, that there must be just ground for apprehending personal violence, before the wife can voluntarily go away, and charge the husband with her support;"[5] in other words, there must be legal cruelty;[6] and, if legal cruelty has been inflicted, the husband cannot absolve himself by a demand upon the wife to return.[7] The true view plainly is, that, when the wife is away without the husband's consent, he is not to be charged with necessaries furnished her, unless he has committed acts justifying a suit against him for divorce, either from the bond of matrimony or from bed and board.

§ 571. **Continued.** — There is a Massachusetts case, in which, by way of dictum, the judge who delivered the opinion seemed to maintain an opposite doctrine to the one which in these sections is deemed to be best supported in reason.[8] There is another Massachusetts case which perhaps wears the contrary aspect;[9] but neither in Massachusetts nor in our States generally is this question apparently so decided as to preclude future investigation. The fact that formerly, in England, the question of divorce was adjudicated in a tribunal whose rules of decision were little known to the common-law courts in which suits for necessaries were brought, led the latter to make little mention of ecclesiastical authorities in their decisions

[1] Harwood *v.* Heffer, 3 Taunt. 420.

[2] Liddlow *v.* Wilmot, supra; Aldis *v.* Chapman, 1 Selw. N. P. 11th ed. 298; Hunt *v.* Blaquiere, 3 Moore & P. 108; Sykes *v.* Halstead, 1 Sandf. 483.

[3] Houliston *v.* Smyth, supra.

[4] Blowers *v.* Sturtevant, 4 Denio, 46, 49; Fredd *v.* Eves, 4 Harring. Del. 385, 387.

[5] Blowers *v.* Sturtevant, supra; Fredd *v.* Eves, supra.

[6] But see, on this subject, Ayer *v.* Ayer, supra.

[7] Emery *v.* Emery, supra.

[8] Berlen *v.* Shannon, 3 Gray, 387, 390.

[9] Hancock *v.* Merrick, 10 Cush. 41.

upon this subject. And the habit, once adopted, remained, and was transmitted to this country. But there is no principle of our law which requires a judge to close his eyes to light, on the ground that it did not fall on his predecessor's eyes though open. Some further views on this subject appear in our chapter on Desertion, in the present volume.

§ 572. **Nature of the Credit — Notice.** — The credit for necessaries, which a discarded wife carries with her, is a general credit; and the husband cannot restrict it by giving notice to a particular person not to trust her.[1] And if the wife was justified in leaving the husband on account of his misconduct, a notice to her to return will be of no avail to abridge the credit.[2]

CHAPTER XXXIV.

SEPARATIONS THROUGH THE WIFE'S FAULT.

§ 573. **General Doctrine — Husband's Consent to be holden.** — If the wife abandons her husband without justifiable cause;[3] or if she commits adultery, and the husband for this reason turns her away;[4] or, *a fortiori*, if she voluntarily lives absent from him in adultery;[5] or, if otherwise she is living apart from him without his consent or fault:[6] he is not, unless by express or implied agreement, liable for necessaries which a third person may furnish her on her order. There are cases, however, in which, though the separation was by the fault of the wife, the judge or the jury has gone a considerable length in presuming agency in her, where any special conduct of his has laid the foundation for the presumption.[7] Thus where, after the abandonment, the husband made a proposition to his

[1] Bolton *v.* Prentice, 2 Stra. 1214; Harris *v.* Morris, 4 Esp. 41.

[2] Emery *v.* Emery, 1 Y. & J. 501, 6 Price, 336.

[3] Williams *v.* Prince, 3 Strob. 490; Brown *v.* Patton, 3 Humph. 135; Cany *v.* Patton, 2 Ashm. 140; Allen *v.* Aldrich, 9 Post. N. H. 63. And see Barnes *v.* Allen, 30 Barb 663.

[4] Hunter *v.* Boucher, 3 Pick. 289; Ham *v.* Torrey, Selw. N. P. 271, 276.

[5] Morris *v.* Martin, 1 Stra. 647; Manwairing *v.* Sands, 2 Stra. 706.

[6] Rutherford *v.* Coxe, 11 Misso. 347.

[7] See Collins *v.* Mitchell, 5 Harring. Del. 369; Norton *v.* Fazan, 1 Bos. & P. 226.

son-in-law to supply her with necessaries, and she was sick, and the son-in-law procured the services of a physician, the husband was held liable; the court observing: "Although the proposition as to the manner of compensating the son-in-law was not accepted by him, still the letter may be understood as an understanding to pay for necessaries. The sympathy expressed in the letter, the wish that her wants should be supplied, &c., evinced a willingness to supply those comforts, and ought not to be restricted to a particular mode of paying for them."[1]

§ 574. **Wife committing Adultery — Mutual Guilt.** — Where husband and wife are living apart under such circumstances as to render him liable for necessaries furnished her, if she then commits adultery, his liability ceases from the time when the adultery is committed.[2] And it has been even laid down in England, and it seems there to be accepted as sound in law, that, if a husband commits adultery, and then turns his wife out of doors, and thereupon she commits adultery herself, the husband's liability to pay for necessaries furnished her ceases when her adultery commences, though she thereupon offers to return to him, and he refuses to receive her.[3] The view taken of the question by Mr. Justice Buller, at a *nisi prius* trial, was, "that the husband was not bound to receive the wife after she had committed adultery, and consequently was not bound to support her." And by the court in bank it was observed: "If the wife had instituted a suit in the ecclesiastical court against the husband for restitution of conjugal rights, they would not have assisted her."[4]

§ 575. **Mutual Guilt, continued.** — It seems to the writer of these volumes, that, if we look at this point in the light of legal reason, we shall arrive at the following conclusion: The husband and wife, by the act of marriage, established between themselves an identity of interest, and her personal property and effects became vested in him. Thereupon the law laid on him the duty to support her; and, though she might by her

[1] Brown *v.* Patton, supra, p. 139, opinion by Green, J.

[2] Cooper *v.* Lloyd, 6 C. B. N. S. 519; Atkyns *v.* Pearce, 2 C. B. N. S. 763.

[3] Govier *v.* Hancock, 6 T. R. 603; in effect, affirmed in Rex *v.* Flintan, 1 B. & Ad. 227.

[4] Govier *v.* Hancock, supra, p. 603, 604.

wrongful conduct forfeit her claim to a support, and disqualify herself to appear as a plaintiff against him in a suit for divorce when he had also broken the common matrimonial obligation, yet, if he were guilty, why should she be the only one to starve? In cases of mutual guilt, the plaintiff in a divorce suit does not stand *rectus in curia;* therefore such a plaintiff cannot proceed with the action. But although a plaintiff, who has furnished necessaries to a wife living apart from her husband sues, in a certain sense, in her stead, yet truly he is an independent person, who, in giving subsistence to a needy human being, did a meritorious act; while it would be no hardship upon the husband to hold, that he should not be permitted to complain, in defence to the action, of the same thing in his wife of which he is guilty himself. Perhaps the doctrine thus intimated needs to be qualified; but to hold, that, in all circumstances, a man may commit adultery, and drive away his wife, without being obliged to do any thing for her support, or refund any of the property he got by her, if he can goad her in a single instance to follow his example of evil-doing, is to place wickedness in the man on an elevation quite too high above the place occupied by wickedness in the woman.

§ 576. **Continued.** — In a Massachusetts case the court held, that, if a husband deserts his wife, and takes measures by which she is led to believe, and does believe, he is dead, whereupon she marries another man; then, if afterward she finds he is alive, and leaves the man she married, the husband is under obligation to supply her with necessaries, though she has been convicted of polygamy by reason of the second marriage. Said the judge: "If the defendant caused his wife to be misled into a belief of his death, and of her right to marry [the second time], he is estopped from taking advantage of her conduct."[1] This reasoning of the court may be just; but another reason, about which no real doubt ought to be raised, is, that the conduct of the wife in entering into this second marriage was not criminal; her cohabitation under it, down to the time of her discovering the mistake, was not adultery;[2] therefore this circumstance should not prejudice her claim for necessaries.

[1] Cartwright *v.* Bate, 1 Allen, 514, 516, Chapman, J.

[2] As to whether there ought to be a conviction for polygamy in such a case,

§ 577. **Husband condoning Wife's Fault.** — Where the separation has been produced by the fault of the wife, if the husband forgives her and receives her back to cohabitation, he cannot afterward set up this fault in bar to an action against him for necessaries furnished subsequently to the time when the condonation passed; but still the bar remains good as to necessaries furnished during the separation.[1]

CHAPTER XXXV.

SEPARATION BY MUTUAL CONSENT.

§ 578. — **General Doctrine — Husband making an Allowance.** — When a husband and his wife agree to live separate, the agreement, in reason, should not be extended by interpretation beyond its terms; and, as the husband was under obligation to support his wife during the cohabitation, so equally is he, during the separation. This plain proposition embraces substantially all which can be said with certainty, as to the law applicable under our present head. The books, indeed, lay down the doctrine in very broad general terms, that the husband is bound to support his wife where the two are separated by mutual consent, the same as where they are living in cohabitation, and even the same as where they are separated through his fault.[2] There are cases which even appear to lay it down, that, during such a separation, though the husband may make an allowance for his wife, yet he is holden for necessaries furnished her, if the allowance is inadequate, the same as he would be were he in fault in the separation.[3]

see Bishop Stat. Crimes, § 356, 1021, 1022 and note.

[1] Williams *v.* Prince, 3 Strob. 490; Henderson *v.* Stringer, 2 Dana, 291; Harris *v.* Morris, 4 Esp. 41.

[2] See, on this general subject, Frost *v.* Willis, 13 Vt. 202; Lockwood *v.* Thomas, 12 Johns. 248; Baker *v.* Barney, 8 Johns. 72; Rumney *v.* Keyes, 7 N. H. 571; Evans *v.* Fisher, 5 Gilm. 569; Johnston *v.* Sumner, 3 H. & N. 261; Dixon *v.* Hurrell, 8 Car. & P. 717.

[3] Pearson *v.* Darrington, 32 Ala. 227; Fredd *v.* Eves, 4 Harring. Del. 385; Cany *v.* Patton, 2 Ashm. 140.

§ 579. **Husband making an Allowance, continued.** — In a New Hampshire case, where the wife was living with her father under an agreement by the husband to pay for her support, and the separation was by the mutual consent of husband and wife, and she voluntarily left her father's house, it was held that the husband was not liable to a third person for necessaries furnished her. Said Richardson, C. J.: "In the case now before us, the separation took place by mutual consent, and the husband is liable for her support, unless he has made suitable provision for her maintenance, of which she can avail herself. And to show this, the burden of proof is upon the husband. But he having placed the wife with her father, who is of sufficient ability, under a contract by the father to maintain her, this, *prima facie*, exonerates the husband. And, to maintain this action, the plaintiff must show that she is deprived of that support without her fault, so that the defendant may have a remedy on the bond against her father, if the condition has been broken."[1] We are here, however, running very close upon doctrines relating to separations under articles, — a matter to be discussed in another chapter.

§ 580. **Continued.** — There is reason for the doctrine, that, if a husband and wife separate by mutual consent, and she undertakes to live on her own estate or earnings, and not to come upon the husband for any of her expenses; or, if she engages to accept a small sum, which is paid her, though the sum be wholly inadequate; still, so long as the separation continues on this footing, she cannot pledge his credit for any thing, however much she may stand in need of the credit. Indeed this point was, in substance, decided in a late English case; and Bramwell, B., observed: "If the husband consent to the wife living apart from him on the terms that she shall not bind his credit, that consent is conditional; and, if she do not perform that condition, she is not living apart with his consent."[2] Plainly an agreement of this sort would be a revocable act; but, while the act remained unrevoked, all principles of law would concur in holding, as the English court held, that the wife did

[1] Pidgin *v.* Cram, 8 N. H. 350, 352. See Carley *v.* Green, 12 Allen, 104.

[2] Biffin *v.* Bignell, 8 Jur. N. S. 647, 648, 7 H. & N. 877, 880. And see Johnston *v.* Sumner, 3 H. & N. 261.

not carry with her the husband's credit. Her remedy, if she found herself in straitened circumstances, would be to revoke the agreement of separation.[1]

CHAPTER XXXVI.

DOCTRINES COMMON TO THE SEVERAL FORMS OF SEPARATION BY PAROL.

§ 581. **Scope of this Discussion.** — It is not within the scope of these volumes to discuss, in a general way, the rights of property growing out of the marriage relation. Yet it does belong to them to show the effect of a divorce upon those property rights. In like manner, when we are here considering the question of separations between husband and wife without divorce, we are not to examine the property rights which, as a general question, flow from marriage; but, assuming them to be known to the reader, we are to inquire what effect upon them, and upon the general relation of husband and wife, is produced by the act of separation. In chapters preceding this, we have looked at special principles which govern particular sorts of separation; in this chapter, we are to take a view of some which are common to all. The general rights which the law of marriage confers upon the parties, and its effect on their property, are things discussed by the author in his work on the Law of Married Women.

§ 582. **General Property Rights.** — In regard to rights of property, the relation of husband and wife is not much affected by separation. There are, however, some circumstances in which the courts take the fact of a separation, and its causes, into the account, when adjusting property rights between the parties.

[1] See further, on this subject, Vol. II. § 401, note.

Upon this general subject, the reader is referred to some cases cited in a note,[1] but more particularly to the fuller discussion in the before-mentioned work on the Law of Married Women.

§ 582 *a*. **How the Chapter divided.** — We shall consider, I. Separation as conferring on the Wife the Powers of a *Feme Sole;* II. Other Particular Topics.

I. *Separation as conferring on the Wife the Powers of a Feme Sole.*

§ 583. **Husband presumed to be Dead.** — Says Professor Greenleaf: "Where the issue is upon the *life* or death of a person, once shown to have been living, the burden of proof lies upon the party who asserts the death. But after the lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party."[2] The books contain various cases in which, within this rule, the acts of the wife, deserted by her husband, have been sustained as the acts of a *feme sole;* it being presumed that the husband was dead.[3]

§ 584. **Custom of London — South Carolina.** — Likewise, in South Carolina, the law, derived from the custom of London, permits married women to act, within certain limits, independently of their husbands, as *feme sole* traders; and, in these cases, it is immaterial whether or not the husband and wife are living together.[4] This custom is in Bright on Husband and

[1] High *v.* Worley, 33 Ala. 196, 199; Chouteau *v.* Douchouquette, 1 Misso. 669; Ames *v.* Chew, 5 Met. 320; Wooters *v.* Feeny, 12 La. An. 449; Juffrion *v.* Bordelon, 14 La. An. 618; McCormick *v.* McCormick, 7 Leigh, 66; The Judge *v.* Kerr, 17 Ala. 328; Schindel *v.* Schindel, 12 Md. 294; Pressley *v.* McDonald, 1 Rich. 27; Vaughan *v.* Buck, 3 Eng. L. & Eq. 135, 1 Sim. N. S. 284; Parsons *v.* Parsons, 9 N. H. 309; Roland *v.* Logan, 18 Ala. 307; Lawrence *v.* Spear, 17 Cal. 421; Cain *v.* Bunkley, 35 Missis. 119; Chouteau *v.* Merry, 3 Misso. 254; Norcross *v.* Rodgers, 30 Vt. 588; Abernathy *v.* Abernathy, 8 Fla. 243; Krupp *v.* Scholl, 10 Barr, 193; Rorer *v.* O'Brien, 10 Barr, 212; Tyson's Appeal, 10 Barr, 220; Rees *v.* Waters, 9 Watts, 90; Van Note *v.* Downey, 4 Dutcher, 219; Gaston *v.* Frankum, 11 Eng. L. & Eq. 226, 16 Jur. 507; Hall *v.* Faust, 9 Rich. Eq. 294; Whitten *v.* Whitten, 3 Cush. 191; Johnson *v.* Johnson, 4 Harring. Del. 171; Moores *v.* Carter, 1 Hemp. 64; Kee *v.* Vasser, 2 Ire. Ch. 553; McKinnon *v.* McDonald, 4 Jones Eq. 1; West *v.* West, 10 S. & R. 445.

[2] 1 Greenl. Ev. § 41; ante, § 452.

[3] Boyce *v.* Owens, 1 Hill, S. C. 8; Cusack *v.* White, 2 Mill, 279; King *v.* Paddock, 18 Johns. 141. And see Tucker *v.* Scott, Pennington, 955; Chouteau *v.* Merry, 3 Misso. 254.

[4] McDaniel *v.* Cornwall, 1 Hill, S. C. 428; Newbiggin *v.* Pillans, 2 Bay,

Wife stated in a translation from the *Liber albus*, in the town clerk's office, as follows: "Where a *feme covert* of the husband useth any craft in the said city on her sole account, whereof the husband meddleth nothing, such a woman shall be charged as a *feme sole* concerning every thing that toucheth the craft; and, if the husband and wife be impleaded, in such case the wife shall plead as a *feme sole;* and, if she be condemned, she shall be committed to prison till she have made satisfaction, and the husband and his goods shall not in such case be charged nor impeached."[1] But though the husband is thus free from responsibility in these cases, and the wife is really the party proceeded against, he must still be joined, as the books say, "for conformity."[2] The wife, to be a *feme sole* trader, must *trade* or be engaged in commerce;[3] therefore a wife separated from her husband, and supporting herself by her manual labor, is not a *feme sole* trader.[4] But the business of keeping a boarding house is one in which a *feme covert* may become a *feme sole* trader.[5] If the husband has any concern in the business, the wife is no longer to be deemed a *feme sole* in respect to it.[6] Such a trader, it seems, cannot execute a valid bond.[7]

§ 585. **Pennsylvania — North Carolina.** — There is something analogous to the South Carolina doctrine established by statute in Pennsylvania; still, as observed in one of the cases, "there is no *feme sole* trading by a married woman with us, but such as is licensed and regulated by the statute of 1718."[8] This South Carolina doctrine, moreover, does not prevail in North Carolina;[9] and it is believed not to be known elsewhere in the United States.

§ 586. **General Doctrine — Wife separated still under Coverture.** — Shutting out from our view, therefore, the doctrine which is

162; Surtell *v.* Brailsford, 2 Bay, 333; Blythwood *v.* Everingham, 3 Rich. 285; Hobart *v.* Lemon, 3 Rich. 131; Brown *v.* Killingsworth, 4 McCord, 429.

[1] 2 Bright Hus. & Wife, 77.

[2] 2 Bright Hus. & Wife, 78; Candell *v.* Shaw, 4 T. R. 361; Eldon, C. J. in Beard *v.* Webb, 2 Bos. & P. 93, 98; Starr *v.* Taylor, 4 McCord, 413.

[3] McDaniel *v.* Cornwall, 1 Hill, S. C. 428.

[4] Robards *v.* Hutson, 3 McCord, 475.

[5] Dial *v.* Neuffer, 3 Rich. 78.

[6] Lavie *v.* Phillips, 3 Bur. 1776; Langham *v.* Bewett, Cro. Car. 68.

[7] Read *v.* Jewson, stated 4 T. R. 362.

[8] Jacobs *v.* Featherstone, 6 Watts & S. 346. And see Burke *v.* Winkle, 2 S. & R. 189; Valentine *v.* Ford, 2 Browne, 193.

[9] McKinnon *v.* McDonald, 4 Jones Eq. 1.

founded on the custom of London, we have the general proposition already mentioned, that a wife is substantially as much under coverture, in law, during a separation from her husband, as when she is cohabiting with him.[1] For example, her deed, conveying her real estate, is void;[2] she cannot be holden on her promissory note,[3] or on her bond.[4] She cannot ordinarily, at law, even pledge her own credit for necessaries; though, if she has a separate estate, this estate may sometimes be reached by a bill in equity; or, in some States, through express legislation, or some peculiarity in the general jurisprudence of the State, by a suit at law.[5] This is the general doctrine: let us see what exceptions to it we can find.

§ 587. **Civil Death.** — There were anciently, in England, two forms of what is in the law called civil death, known as banishment, and abjuration of the realm; the former, it appears, being inflicted by direct sentence of court as a penalty for crime; and the latter being voluntarily accepted, with its accompanying oath, in order to escape the heavier infliction of death.[6] The punishment by banishment was afterward succeeded by the similar punishment of transportation;[7] but abjuration of the realm was entirely abolished.[8] In these ancient times, therefore, it was held, that, if the husband were banished, or had abjured the realm, the wife might sue or be sued as a *feme sole*. "And here it is to be observed," says Lord Coke, "that an abjuration, that is, a deportation for ever into a foreign land, like to profession [the matter of which Littleton was speaking], is a civil death; and that is the reason that the wife may bring an action, or may be impleaded, during the natural life of her husband. And so it is, if by act of Parliament the husband be attainted of treason or felony, and, saving his life, is banished for ever, this is a civil death,

[1] Ante, § 581, 582; Robinson *v.* Reynolds, 1 Aikens, 174.

[2] Thorndell *v.* Morrison, 1 Casey, 326.

[3] Chouteau *v.* Merry, 3 Misso. 254; Imhoff *v.* Brown, 6 Casey, 504; Painter *v.* Weatherford, 1 Greene, Iowa, 97; Moses *v.* Fogartie, 2 Hill, S. C. 335.

[4] Freer *v.* Walker, 1 Bailey, 184.

[5] Shaw *v.* Thompson, 16 Pick. 198; Wooster *v.* Northrup, 5 Wis. 245; Childress *v.* Mann, 33 Ala. 206. 1 Bishop Mar. Women, § 894 and the chapter commencing § 840.

[6] 4 Bl. Com. 332, 333, 377; Jacob Law Dict. *tit.* Abjuration, Banishment.

[7] Jacob Law Dict. *tit.* Transportation.

[8] 4 Bl. Com. 333. See some excellent reasons for the abolishment in the preamble of Stat. 22 Hen. 8, c. 14.

and the wife may sue as a *feme sole*. And hereby you may understand your books, which treat of this matter. But if the husband, by act of Parliament, have judgment to be exiled but for a time, which some call relegation, that is no civil death. And in 8 E. 2, an abjuration is called a divorce between the husband and wife. *Sed opus est interprete;* for by law no subject can be exiled or banished his country, whereby he shall *perdere patriam*, but by authority of Parliament, or in case of abjuration, and that must be upon an ordinary proceeding in law." [1]

§ 588. **Continued.** — In short, according to our author, this civil death of the husband, where also he was made to absent himself from the kingdom, produced apparently the effect of an actual death as to the wife's capacity in law, — a result which probably was not quite reached by a civil death where the personal presence remained in the country.[2] Thus, he adds: "If the husband had aliened the land of his wife, and after had committed felony, and been abjured the realm, the wife shall have a *cui in vita* in his lifetime, ... for that the abjuration was a civil death." [3] Indeed the civil death which came from being a professed religionist, and the like, — any civil death, — was sufficient to cause an estate for the life of the husband to terminate, so as to let in the party in expectation; unless the estate were expressly limited *for the "natural" life*, instead of the life in general terms.[4] And on this principle, as observed by Mr. Roscoe, "where the husband of the Lady Sandys was banished, during life, by act of Parliament, the court were of opinion that she might in all things act as a *feme sole*, as if her husband were dead; that the necessity of the case required she should have such power, and that a will made by her was good." [5]

§ 589. **How of Civil Death in United States — Wife sue and be sued.** — This rule of the ancient common law is plain, in-

[1] Co. Lit. 133 *a*. And see Wilmot's Case, Sir F. Moore, 851.

[2] This latter clause is only my general impression of the matter; the point, being of no practical importance with us, does not demand a more exact examination.

[3] Co. Lit. 133 *a*.

[4] 2 Bl. Com. 121; Canterbury's Case, 2 Co. 46 *a*, 48 *b*.

[5] Note to Bingsted *v.* Lanesborough, 3 Doug. 197, 206; referring to Portland *v.* Prodgers, 2 Vern. 104. See also Newsome *v.* Bowyer, 3 P. Wms. 37. And see Wright *v.* Wright, 2 Des. 242; Troughton *v.* Hill, 2 Hayw. 406.

telligible, and exact. But in the United States we have no such thing as civil death, or banishment, or abjuration of a State or the country; we have here, therefore, nothing whereon this common-law rule, as thus explained, can operate. In England also, there is little, if any thing, now left of the old, in this respect. Yet both in England and in the United States, the courts permit, in exceptional cases, wives living apart from their husbands to sue and be sued as *femes sole*. There is not, however, either in England or in any of our States, any such clear doctrine laid down upon this subject as to leave future cases entirely beyond doubt; and especially are there no such reasons given for the decisions as should satisfy philosophical inquiry. In our States the decisions are conflicting; or, if not absolutely so, the right of the *feme covert* to act as a *feme sole* is extended much further in some of the States than in others. Most of the decisions appear to proceed upon analogies which the judges assume to draw between the case in judgment and the old case of abjuration or banishment; but the analogies are not all perfect, and perhaps the attempting of them is in some instances of doubtful utility.

§ 590. **Sue and be sued as Feme Sole, continued — How in England.** — In England, notwithstanding the old doctrine, according to which, as Lord Coke has stated,[1] if the banishment is only for a term of years the right of the wife to act as a *feme sole* does not arise, — it has been ruled that, where the husband is convicted of felony, and sentenced to transportation for a term of seven years, the wife may, down to the time of his actual return to the kingdom on the expiration of the sentence, maintain a suit in her own name.[2] Also, if the husband is an alien enemy, — so it was adjudged in a suit against the Duchess of Mazarine, who, the report says, "had lived here in England for twenty years as a *feme sole*, and had contracted continually as such," — the capacity to be sued, or to sue, exists. Said Lord Holt, C. J.: "When the husband is an alien enemy, and under an absolute disability to come and live

[1] Ante, § 587.

[2] Carrol *v.* Blencow, 4 Esp. 27. And see Ringsted *v.* Lanesborough, 3 Doug. 197 and notes. Mr. Roscoe observes, ib. p. 206, "This point is adverted to by Lord Eldon, C. J. in Marsh *v.* Hutchinson, 2 Bos. & P. 226, 232, and appears to have been considered by him as a question of much doubt." But see Ex parte Franks, 7 Bing. 762.

here, the law perhaps will make the wife of such a husband chargeable as a *feme sole* for her debts and contracts. For this case does not differ from the case of my lady Belknap and my lady Weyland, who were allowed able to sue and be sued upon the abjuration or banishment of their husbands, as if they had been sole."[1] The reader will observe, that, in these two cases of the transportation of the husband, and of his being an alien enemy abroad, there is in him an absolute incapacity, either temporary or permanent, to come to England, and to discharge there any of the duties of husband. Herein the analogy to banishment or abjuration seems nearly, if not absolutely, complete.

§ 591. **Continued — Case not Analogous to Civil Death.** — There have been, in England, several judicial attempts to break away from this anchorage ground, and permit the wife to sue and be sued under various other circumstances. Thus in the time of Lord Mansfield, several cases occurred wherein this able judge, by his influence, carried the court a good way out to sea. In one of these cases it was held, that the wife of a person who resides in Ireland, herself living in England, and having a separate maintenance under articles of separation, may be sued after the death of her husband for a debt contracted by her in England during his lifetime.[2] In another of these cases the decision was, that a *feme covert* living separate from her husband, and having a competent separate maintenance duly paid her, may be sued alone on a contract made by her for necessaries. "As the usages of society alter," said Lord Mansfield, "the law must adapt itself to the various situations of mankind." And the principle upon which he and the other judges put this decision was, that the husband was not liable, therefore that the wife should be.[3] Afterward came the famous case of Corbett *v.* Poelnitz, in which the doctrine was maintained, that a *feme covert*, living apart from her husband, and having a separate maintenance, may contract and be sued as a *feme sole*, and her second husband is liable for such debt.[4] Still later, these and all the other like cases

[1] Derry *v.* Mazarine, 1 Ld. Raym. 147.

[2] Ringsted *v.* Lanesborough, 3 Doug. 197.

[3] Barwell *v.* Brooks, 3 Doug. 371.

[4] Corbett *v.* Poelnitz, 1 T. R. 5.

were overturned, under Lord Kenyon; the court holding, in Marshall *v.* Rutton, that a *feme covert* cannot contract and be sued as a *feme sole*, even though she is living separate from her husband, having a separate maintenance secured to her by deed.[1] This latter decision accords fully with the earlier English law.[2] And the principle of the decision was applied to a case in which the husband not only deserted his wife, but abandoned also (not abjured, which is a proceeding of record) permanently the realm; here, though the absence, amounting in its facts to desertion, had continued four years, and the husband had not been heard of, and the wife had traded and conducted her business as a *feme sole*, she was not permitted to maintain in her own name an action of trespass for entering her premises and carrying off goods which she had accumulated.[3]

§ 592. **Continued.** — If the reader will turn to Bright on Husband and Wife, he will there see a review of various cases in which differing English judges have favored or combated the idea, that, if the husband absents himself permanently from the kingdom, or if he is an alien and has never resided in the kingdom, though he is not an alien enemy, the wife may then appear in court as a *feme sole*. The result seems to be, that no such doctrine is certainly established in England; though perhaps the question is not so settled as to preclude future discussion, should some extreme case arise.[4] Thus we

[1] Marshall *v.* Rutton, 8 T. R. 545. And see 2 Bright Hus. & Wife, 69; 1 Kent Com. 160. Chancellor Kent, in this place, mentions some cases as having shaken the decision in Corbett *v.* Poelnitz, before this case of Marshall *v.* Rutton arose; namely, Compton *v.* Callwin, 1 H. Bl. 334, 350; Ellah *v.* Leigh, 5 T. R. 679; Clayton *v.* Adams, 6 T. R. 604. For later adjudications, see Meyer *v.* Haworth, 8 A. & E. 467; Smith *v.* The Sheriff of Middlesex, 15 East, 607; Barden *v.* Keverberg, 2 M. & W. 61.

[2] See, for a full view of this matter, 2 Kent Com. 154 et seq.

[3] Bogget *v.* Frier, 11 East, 301. And see to the same effect, Farrer *v.* Granard, 1 New Rep. 80; McNamara *v.* Fisher, 3 Esp. 18; Marsh *v.* Hutchinson, 2 Bos. & P. 226.

[4] 2 Bright Hus. & Wife, 71–74; referring to Marsh *v.* Hutchinson, 2 Bos. & P. 226; Chambers *v.* Donaldson, 9 East, 471; Bogget *v.* Frier, 11 East, 301; Johnston *v.* Kirkwood, 4 Dru. & W. 379; Williamson *v.* Dawes, 2 Moore & S. 352; Kay *v.* Pienne, 3 Camp. 232, see 2 Bos. & P. 233; Stretton *v.* Busnach, 4 Moore & S. 678, 1 Bing. N. C. 139; Barden *v.* Keverberg, 2 M. & W. 61. In De Gaillon *v.* L'Aigle, 1 Bos. & P. 357, — a case in which it did not appear whether or not the husband had ever resided in England, — it was held, that, where he was permanently abroad, and the wife had traded and obtained credit in England as a *feme sole*, repre-

have seen what are the principal English doctrines upon the subject under discussion; and the conclusion appears to be, that, unless the husband is absent from the kingdom under circumstances which preclude his coming or returning to the kingdom, — preclude, as matter of law, not merely as matter of volition, or will, in him, — the wife cannot be treated in a court of common law as a *feme sole*. She can neither sue there, nor be sued. If she has a separate estate, she may perhaps bind such estate by her contract in a way to enable the creditor to reach it in a court of equity,[1] — a perplexed matter, however, which does not come within the topics to be discussed in the present volumes.[2]

§ 593. **Continued — Wife's Remedy for Torts.** — Thus, therefore, a creditor is not under all circumstances without his remedy against any fund which a wife living separate from her husband may possess. On the other hand, if she has suffered a wrong from any third person, she may bring a suit in the name of her husband, or in the name of herself and husband jointly, as the case may require; and, though it is in general and perhaps always in the power of the husband to release the action and thus defeat her remedy,[3] still there is a class of authorities which appear to hold, that, while the court will, in proper circumstances, on his application, direct her to furnish him indemnity against the costs, it will not permit him to discontinue the suit, or otherwise to bar the action in fraud of the wife.[4] It is probably the true view in these cases, that, if there is a mere separation *in pais*, and no judicial sentence, the husband can always at law defeat the action by releasing it; and

senting herself to be such, she could be made answerable to the creditor in a suit at common law; but this author, Vol. II. p. 70, sets down this case as among those which were overruled in Marshall *v.* Rutton, 8 T. R. 545. See also Hatchett *v.* Baddeley, 2 W. Bl. 1079; Gilchrist *v.* Brown, 4 T. R. 766; Lean *v.* Schutz, 2 W. Bl. 1195. Chancellor Kent says, of the modern English law: "The old rule is deemed to be completely re-established, that an action at law cannot be maintained against a married woman, unless her husband has abjured the realm." 2 Kent Com. 161.

[1] Ante, § 586; McNamara *v.* Fisher, 3 Esp. 18.

[2] As to which see 1 Bishop Mar. Women, § 840 et seq.

[3] 1 Bishop Mar. Women, § 912.

[4] Chambers *v.* Donaldson, 9 East, 471; Innell *v.* Newman, 4 B. & Ald. 419; Harrison *v.* Almond, 4 Dowl. P. C. 321; Suter *v.* Christie, 2 Add. Ec. 150; Rock *v.* Slade, 7 Dowl. P. C. 22. And see Lynch *v.* Knight, 5 Law Times N. S. 291.

hitherto we have no distinct and admitted equity jurisdiction to interfere in her behalf. If, by stipulation between the husband, wife, and a trustee, in articles, the fund in controversy is to be for the wife's separate use,[1] the case is different. The reader perceives, however, that the doctrine of this section relates to the ordinary cases of separation, and not to those in which the wife sues as a *feme sole* by reason of the husband's abjuration of the realm and the like.

§ 594. *American Authorities as to the Abandoned Wife's Capacity to sue and be sued : —*

General View. — This minute consideration of the English law — which does not, however, include a reference to quite all of the unimportant English cases — seemed to be necessary as a starting-point whence to proceed to an examination of the American authorities. And now that we have arrived at this starting-point, we can find no way of travelling, with any success, through the American cases, except to take the States in their order. And when we are upon a particular State, we can say only what has been decided in the State ; we cannot prophesy concerning future decisions, or tell what authority, of the conflicting ones, from beyond the limits of the State, the judges will deem to be of the greater weight. And the reader is cautioned here, as in respect to all questions of law upon which there may probably be differences in the different States, found in a general treatise, that it will not be safe for him to take the words of the text-writer as ultimate authority, without looking into the decisions, and especially into the statutes, of his own State for himself.

§ 595. **Alabama.** — It has been held in this State, that a married woman whose husband has, to use the language of the report, abjured the State, — an expression not accurate, yet common in this country ; for, as we have seen,[2] there is with us no such thing as an abjuration of the State, — and who has since traded as a *feme sole*, and taken notes in her own name, may in her own name sue for and recover the amount.[3] To constitute an abjuration within the meaning of this rule, the husband must both depart beyond the limits of the State, and

[1] Innell *v.* Newman, supra.

[2] Ante, § 589.

[3] Arthur *v.* Broadnax, 3 Ala. 557.

also entertain the intent not to return, and not to cohabit more with his wife.[1] The court in one case sustained the following doctrine; namely, that, if a husband removes with no intention of returning, from this State into another State, declares his determination to abandon his wife, and absents himself for more than five years, the law confers on her the capacity of contracting and suing, as though she were a *feme sole*, — observing: "There is no doubt but that, by the rigid rules of the common law, the wife, under the circumstances here presented, would labor under all the disabilities of coverture, and the authorities cited by the counsel for the plaintiff in error show that the settled law of the English courts sustains the view for which he contends. The English cases, however, are not at all consistent upon the doctrine.[2] . . . But a more liberal rule, and one which, we think, is more consistent with reason and justice, seems to obtain in this country." [3] At a later period, a statute of this State provided, that, "when a husband and father has deserted his family, the wife and mother may prosecute or defend, in his name, any action which he might have prosecuted or defended, and has the same powers and rights he might have had." And the court has held, that, in order for a wife to prosecute or defend under this statute, she must appear in the facts of the case to be also a mother, and the husband to be also a father.[4]

§ 596. **Connecticut.** — A statute in this State provides, that, "whenever any married woman shall have been abandoned by her husband, it shall be lawful for her during the continuance of such abandonment to transact business in her own name, and to sue and be sued in all courts of justice." And the court has held, that, though the wife is in fault, and the husband for this cause lawfully abandons her, still the case is within the statute; neither is it important that the abandonment should have continued for any particular length of time, provided it is absolute, and intended by the husband to be perpetual.[5]

§ 597. **Illinois.** — The tribunals of this State have gone to a

[1] Krebs *v.* O'Grady, 23 Ala. 727; Ames *v.* Stewart, 9 Ala. 855.

[2] Referring to Clanc. Hus. & Wife, 54 et seq.

[3] Mead *v.* Hughes, 15 Ala. 141, 147, opinion by Chilton, J.

[4] Ex parte Cole, 28 Ala. 50.

[5] Moore *v.* Stevenson, 27 Conn. 14.

very great length in sustaining the separate capacity of the wife. "We hold," said Skinner, J., "the law to be, that, where the husband compels the wife to live separate from him, either by abandoning her, or by forcing her, by whatever means, to leave him; and such separation is not merely temporary and capricious, but permanent and without expectation of again living together; and the wife is unprovided for by the husband in such manner as is suited to their circumstances and condition in life, — she may acquire property, control her person and acquisitions, and contract, sue and be sued in relation to them, as a *feme sole*, during the continuance of such condition."[1] No abandonment of the State, by way of any assumed analogy to the old English abjuration of the realm, is here required; but, in a case, for example, of simple desertion, if the deserted wife obtains a divorce from her husband, and then marries again, the second husband is liable, at law, to pay any debts which she may have contracted after the desertion took place and before the divorce. In short, a deserted wife in Illinois may acquire property, and control it, and her person, and sue and be sued as a *feme sole*.[2] The court, in coming to this conclusion, observed, that the doctrine concerning the right of the wife separated from her husband to act as a *feme sole* has not, in our jurisprudence, been uniform, but it has varied from time to time; therefore, in the language of Skinner, J., "we feel at liberty to adopt such a rule as will best meet the exigencies of society, and accord with the current of modern authority." And he added: "In case of abandonment of the wife by the husband, the reason of the rule of the common law concerning the marital relations ceases to exist; and, with the reason, the rule should cease when demanded by the necessities of justice." A wife may have good cause for divorce from her husband, yet she may have conscientious scruples about applying for this remedy; but she should not, therefore, be deprived of the means of living independently of him. "The husband," added this learned judge, "is discharged from his liability to provide for the wife, if she without cause abandons him; and why the wife, being abandoned by the

[1] Love *v.* Moynehan, 16 Ill. 277, 282.

[2] Prescott *v.* Fisher, 22 Ill. 390.

husband, should be kept continually subject to his plunder, or that of his creditors, must be hard to answer." [1]

§ 598. **Iowa.** — There is, in this State, a statute upon the subject; but it is only cumulative, and it does not abrogate the rule of the common law. At common law it has been held, that, where the wife has been a long time absolutely deserted by her husband, and left wholly to her own means of support, she is free to act as a *feme sole*. According to the facts of the case in which this doctrine was laid down, the desertion had continued fifteen years, and the husband was residing in another State.[2]

§ 599. **Louisiana.** — The relation of husband and wife, in this State, is regulated so much after the rules of the civil law, that perhaps it is not worth while here to consider the Louisiana authorities on the present point. In one case it was held, that only where the husband is absent from the State can a judge authorize the wife to make contracts. Mere absence from the parish is not enough.[3]

§ 600. **Maine.** — In this State, in a recent case in which the authorities were pretty fully considered, the court came to the conclusion, that, though by the general law of husband and wife a married woman cannot make any binding contract whereby she will subject herself to a suit, yet, if there has been a desertion by the husband in the ordinary sense, and the separation has been long continued, and it is so complete as to show a relinquishment by him of his marital rights and relations, — such a case furnishes an exception to the general rule, and she may act and be made liable in law as a *feme sole*. Evidence that the separation was by the mutual consent of the parties (such evidence, it may be observed, would negative the idea of a desertion in the legal sense), and that provision for the separate maintenance of the wife was made by the husband, tends in some degree to prove a relinquishment of his marital rights, but it does not render the conclusion of such relinquishment inevitable. In the particular case before the court, the judges, trying the facts as well as the law, negatived the lia-

[1] Love *v.* Moynehan, supra, p. 280, 282.

[2] Smith *v.* Silence, 4 Iowa, 321.

[3] Wilkinson *v.* Stanbrough, 1 La. An. 264. And see Wooters *v.* Feeny, 12 La. An. 449; Joffrion *v.* Bordelou, 14 La. An. 618.

bility of the wife, saying: "We are not satisfied the separation is so complete that he [the husband] is to be treated as having renounced his marital rights and relations." [1]

§ 601. **Massachusetts.** — "The principle," said Shaw, C. J., in one case, "is now to be considered as established in this State, as a necessary exception to the rule of the common law placing a married woman under disability to contract or maintain a suit, that, where the husband was never within the Commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a *feme sole*. It is an application of an old rule of the common law, which took away the disability of coverture when the husband was exiled or had abjured the realm.[2] . . . . In this respect, the residence of the husband in another State of these United States was equivalent to a residence in any foreign State; he being equally beyond the operation of the laws of the Commonwealth, and the jurisdiction of its courts. But to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm." But in the case in which these observations occurred, although the husband had removed into another State, leaving his wife behind, making no provision for her, and she supported herself by her own labor, the court, on an agreed statement of facts, forbore to hold her responsible as defendant on her promissory note; because it did not appear that the husband was able to provide for her, that he was not in correspondence with her, that when he left or afterward he manifested any intention to desert her, or that he was not necessarily detained away by sickness or imprisonment

[1] Ayer *v.* Warren, 47 Maine, 217, 232.

[2] Referring to Gregory *v.* Paul, 15 Mass. 31; Abbott *v.* Bayley, 6 Pick. 89.

or poverty.[1] In another case it was held, that no action can be maintained against a wife, or against her administrator, for necessaries, upon either an implied or express promise; although at the time of such supply the husband was *non compos*, residing separately from her in the almshouse, — the same learned judge observing: "The cases in which a wife has been held liable as a *feme sole* on her own promise, made when living apart from her husband by mutual agreement, and having a separate maintenance, have not been adopted here; but, were it otherwise, the principle of those cases would not affect the present case, there being no separation by mutual agreement, and no separate maintenance provided for the wife."[2]

§ 602. **Missouri.** — It was in one case held in Missouri, that a *feme covert* is not liable on a promissory note executed by herself, even though her husband has abandoned the State, and has been for many years — in this instance, ten years — absent in another State. Said the judge: "Coverture operates a legal disability to contract, and all contracts of a *feme covert* are absolutely void. The facts in this case do not bring it within any of the exceptions. The cases cited from the English books are, where the husbands abjured the realm, or were foreigners residing abroad. The principles settled in those cases do not apply. If by a removal from one State or another, or a separate residence in different States, the indissoluble connection by which the wife is placed under the power and protection of the husband could be cancelled, and the parties thereby relieved of their respective liabilities and disabilities, there would be little need of troubling the legislature or the courts on the subject of divorces."[3] But in a later case, where a married woman was living separate from her husband under articles of separation, and he resided in another State, and the two had thus lived apart for twenty-four years, the court held that the woman could sue and be sued in her own name.[4]

[1] Gregory *v.* Pierce, 4 Met. 478. See also Commonwealth *v.* Cullins, 1 Mass. 116; Ames *v.* Chew, 5 Met. 320.

[2] Shaw *v.* Thompson, 16 Pick. 198, 200.

[3] Chouteau *v.* Merry, 3 Misso. 254, 255, opinion by Wash, J.

[4] Rose *v.* Bates, 12 Misso. 30.

§ 603. **New Hampshire.** — In a case of desertion by a husband who went to another State and there resided, leaving his wife in New Hampshire, — where, however, if the point were material, the desertion was not of a malicious kind; "never," it was said, "has a year elapsed without her receiving a letter from him, but she has received not much or any support from him since he went away, and none for the last twelve years," — the court held, that, under the common law of the State, the wife was not answerable in a suit for a debt of her contracting. But by operation of the statute of Dec. 24, 1840, "she became," said the judge, "under the circumstances of desertion adverted to, capable of acquiring property." Therefore it was decided that, for the items in the bill contracted previously to the passage of the statute, the action at common law would not lie against him; yet, for the items contracted after the statute was passed, the action would lie.[1]

§ 604. **North Carolina.** — There is an early North Carolina case, in which something like the ancient English abjuration of the realm occurred. In 1777, during the revolutionary war, a man was called upon to take the oath of allegiance to the State, or else to depart; he refused to take the oath, and was compelled to leave the State, under the penalty established by law of incurring the crime of high treason if he returned. His wife, being left behind, married again during his lifetime, and otherwise acted as a *feme sole*. "After much argument, the court said, ... as the bill states that McNeil [the husband] was perpetually banished, it follows that, except as to the objection to the marriage, McNeil is to be considered as to all purposes to be actually dead; and she as to all purposes as a *feme sole*, she may sue and be sued, acquire and transfer property; if she may do so by will, as stated in 2 Vern. 104, there is no reason why she may not also do so by deed."[2]

§ 605. **Ohio.** — In this State it was held by a majority of the court, that, where the brutality of the husband has driven the wife beyond the pale of his protection, and a separation *de facto* exists; she living and maintaining herself as a single woman, and having had specific property decreed to her as alimony,

[1] Brackett *v.* Drew, 20 N. H. 441, 442, opinion by Gilchrist, J.

[2] Troughton *v.* Hill, 2 Hayw. 406.

though no divorce has taken place; an action at law will lie in her name in regard to such property, and the husband need not be joined.[1] But this case touches close upon the effect of a divorce from bed and board, — a matter to be considered in a subsequent part of these volumes.[2] In a later case the same court decided, that coverture is no bar to a woman's suing and being sued as a *feme sole*, in matters pertaining to her maintenance, where her husband deserted her in a foreign country, and she thereupon came to Ohio in which State she supports herself, the husband never having been within the State.[3]

§ 606. **Pennsylvania.** — The decisions in this State, on a point like this, are less satisfactory as precedents to be followed in other States, in consequence of the peculiar blending of the doctrines of the common law and of courts of equity, which there prevails, and does not generally prevail elsewhere in this country.[4] In one case it was held, that, if a wife is left by her husband to earn her own living, she may recover for services to one deceased, from whom she had before received wages, at least in a court of equity.[5] In another case it was held, that, if a husband deserts his wife, — the desertion, in fact, was immediately after the marriage, and the husband married another woman in Canada, — her subsequent acquisitions become her separate property, and she may dispose of them by will or otherwise.[6] But here we are coming to the question of separate property in married women, — a topic not for discussion in the present volumes.[7]

§ 607. **South Carolina.** — We have already considered the doctrine, prevailing in this State, according to which a married woman may act as a *feme sole* trader.[8] Aside from this doctrine, "there is no case," said Nott, J., "where the husband and wife are living in the same State, the wife having no separate estate secured to her by deed, that she has been considered as

[1] Benadum *v.* Pratt, 1 Ohio State, 403.

[2] Vol. II. § 726–741.

[3] Wagg *v.* Gibbons, 5 Ohio State, 580.

[4] 1 Bishop Mar. Women, § 19–22.

[5] Spier's Appeal, 2 Casey, 233.

[6] Starrett *v.* Wynn, 17 S. & R. 130.

[7] See Jacobs *v.* Featherstone, 6 Watts & S. 346; West *v.* West, 10 S. & R. 445; Rees *v.* Waters, 9 Watts, 90; Rorer *v.* O'Brien, 10 Barr, 212; Tyson's Appeal, 10 Barr, 220; Imhoff *v.* Brown, 6 Casey, 504.

[8] Ante, § 584.

able to contract, and to sue and be sued as a *feme sole*." [1] But if a husband leaves the State, without the intention of returning, the wife is competent to contract, and sue and be sued, as a *feme sole*. "By being thus deprived of his aid and protection," said Waties, J., "she was obliged to provide for herself, and was therefore competent to make contracts, and to sue and be sued on them as a *feme sole;* otherwise she would have no means of gaining a support." [2]

§ 608. **United States.** — There is a decision by the Supreme Court of the United States, in which considerable latitude seems to be allowed to the wife to act as a *feme sole* when deserted by her husband; but it does not shed any very exact light on the subject.[3]

§ 609. **Vermont.** — It was held in this State, that no temporary absence of the husband — that is, no absence from which he intends to return — will subject the wife to be sued as a *feme sole*. The learned chief justice observed, that, if the husband were civilly dead, or if he were an alien having never resided in the State, the wife would be liable. But in the present case, "suppose the husband should return while the action was pending, could the plaintiff proceed with his action and imprison the wife? In the event of the return of the husband, it will hardly be contended that property acquired by the wife in his absence would be beyond his control." [4]

§ 610. **General Review.** — The reader who has carefully pondered what is brought to his attention in this review of the English and American decisions upon the authority of a married woman, living apart from her husband, to act as sole, has not failed to observe the following things: First, at the time when our forefathers brought the English common law to this country, and down to the period of the Revolution, there was in England recognized no right in any married woman, not in cohabitation with her husband, any more than if she were in cohabitation, to sue or be sued, or otherwise to act as a single

[1] Brown *v.* Killingsworth, 4 McCord, 429, 431.

[2] Bean *v.* Morgan, 4 McCord, 148. See also Robards *v.* Hutson, 3 McCord, 475; Pressley *v.* McDonald, 1 Rich. 27; Hall *v.* Faust, 9 Rich. Eq. 294; Boyce *v.* Owens, 1 Hill, S. C. 8.

[3] Rhea *v.* Rhenner, 1 Pet. 105. And see Moores *v.* Carter, 1 Hemp. 64.

[4] Robinson *v.* Reynolds, 1 Aikens, 174, 178, opinion by Skinner, C. J.

person; unless the husband was under the disability of what was termed a civil death; and, as it appears, was likewise, and likely to remain ever afterward, personally absent from the kingdom; and unless, also, this civil death, with its accompanying absence, was matter either of judicial or parliamentary record. The English innovations upon this doctrine were made at a time when the English law was of no binding force in this country; and, moreover, those innovations are chiefly, and perhaps wholly, discarded in England by subsequent decisions. Secondly, though there has been manifested a disposition in the United States to break in upon the old English common-law rule, there is no uniformity in the decisions; and there is nothing, therefore, pertaining to this subject, which can be set down as American law, in distinction from the law of some particular State. And there are few States within our Union, if any, in which judicial decision has with any great clearness or certainty defined the limits of the innovation attempted to be made.

§ 611. **The Result.** — The result of these views is, that, in most of our States, and upon most of the points involved, this question is open to be adjudicated in such way as the judges may deem to be indicated by the general principles of our jurisprudence. When we search for these principles, as applicable to the particular matter, we find the following: First, that, to an extent familiarly known to the profession, the English law, as it stood at the time when this country was settled, and not as it has been subsequently modified in England, is our common law. Secondly, that, according to a doctrine of this law which has been adjudicated over and over again in the United States, coverture operates to take from the wife all capacity to bind herself by her own act, or to appear in any court of justice as a *feme sole*. Thirdly, that, if in any case there is an exception made to this principle, it is one in which the woman appears in a court of equity and not in a court of common law. Fourthly, that any abrogation of this principle, by judicial decision, is an act in the nature of a partial divorce. Fifthly, that no divorce, partial or full, not interfering with marital rights or relations, can, without a violation of a most sacred rule of our law, be made by judicial decision, except after notice to the husband,

and liberty given him to come in and object. Consequently, sixthly, that to allow the wife to appear as a *feme sole* in a court, without notice to the husband, without opportunity given him to be heard, — to pass this sort of semi-divorce, applicable only to the particular case, and not operating as a general sentence, — would violate established doctrine; and be, in the judge, an act of law-making, and not of law-expounding. If there were a judicial or a parliamentary record of the fact upon which the idea of a civil death was based, as required in that common law which our forefathers brought to the United States, then, as such record imports absolute verity, the correctness of the matter therein stated would not be open to inquiry, therefore the case would be different. In such a case, though the record were not in form a divorce, the courts might act upon it, the same as they act upon a recorded sentence of divorce.

§ 612. **Continued.** — There is indeed an idea prevalent, not only among the people at large, but among judicial persons also, that, in the language already quoted from Lord Mansfield, "as the usages of society alter, the law must adapt itself to the various situations of mankind." [1] And this idea is, in a certain sense, correct; but it does not justify a judge in violating both established forms and established principles together, and overturning old law, simply on the ground that the man on the bench thinks himself more wise than his forefathers. To the mind of the writer of these volumes it is plain, that a woman deserted permanently by her husband ought to be permitted to act as a *feme sole*, not only in buying and selling ribbons and the like, but also in taking a worthier man for a husband, and benefiting her country and the world by becoming the mother of children. Still, before this is permitted to her, the first husband should have the opportunity of being heard on the question, whether or not he has deserted her, and the finding of the tribunal thereon should be made matter of record imperishable, for the information and guidance of all parties concerned, and of the public. And though the law of husband and wife, both as regards the relations of the parties living together, and their relations living separate, may need amendment, the work of amendment belongs to legislators rather than to judges.

[1] Ante, § 591.

II. *Other Particular Topics.*

§ 613. **Wife's Presumed Agency.** — We have already considered the question of the wife's presumptive agency to bind her husband when he, being on terms of cohabitation with her, is temporarily absent from home.[1] Now, without reference to the question whether the parties are cohabiting or not, there is in the wife a presumed authority to do whatever comes fairly within the scope of a business which he knowingly allows her to conduct.[2] Thus it was held in New Jersey, that a wife who has been permitted by her husband to trade as a separate trader may transfer her stock in payment of notes given for the purchase-money;[3] and, in Delaware, that, if a husband allows his wife to conduct business as a trader, he is liable for her contracts.[4] On this principle, the Connecticut court in a majority opinion decided, that, where a husband who was absent from his family knew his wife to be keeping a boarding-house to support herself and children, and did not return to them, or make any provision for them, but suffered her to continue in the business and to rent a house in which to carry it on, without expressing any dissent or publishing any prohibition; and she conducted the business in a reasonable and prudent manner, to support the family; he was liable on her contract to pay the rent of the house. Said Swift, C. J.: "Where a man permits those over whom he has a lawful control, who are under his government, and who are not legally capable of contracting, to carry on business, without expressing any dissent, publishing any prohibition, or doing any act to restrain them, the law will presume his assent, and he will be liable for their undertakings." Another proposition sustained in this case, was "that, where a husband deserts his wife and children, and leaves her keeping a boarding-house, without furnishing the means for her support, and does not return, or make any provision for them, and the wife continues the business in which her husband left her, conducting in a reasonable and proper manner, to obtain a support for herself and children, the hus-

[1] Ante, § 561–564.

[2] Fenner *v.* Lewis, 10 Johns. 38; Cropsey *v.* McKinney, 30 Barb. 47; Casteel *v.* Casteel, 8 Blackf. 240.

[3] Green *v.* Pallas, 1 Beasley, 267.

[4] Godfrey *v.* Brooks, 5 Harring. Del. 396.

band is liable for her contracts made in the course of such business." And the principle upon which this proposition was sustained was, that, in the absence of notice to the contrary, the husband is presumed in law to consent to the wife's continuing to live with the family as she had done; and so he is responsible for what she brings into the house, the same as though he were at home, or temporarily absent.[1]

§ 614. **Continued.** — This Connecticut case is perhaps open to some observation. Thus, if the husband and wife were permanently living apart, it is, as we shall by and by see, according to the general doctrine, the duty of persons who give a credit to her husband on her order to inquire into the facts of the separation; and the husband, to protect himself, need not give notice to the community not to trust her. How, therefore, can there be any agency in these cases, except such as grows out of the marital relation itself, or the presumptions to be drawn from the actual conduct of the husband under the circumstances? If, as matter of fact, the wife was authorized, the authority would be just as available in one class of circumstances as another. And a presumed authority might arise from the conduct of the husband as well in a case of separation as when the parties were cohabiting. Consequently it has been held, that, if a wife is abandoned by her husband, and she earns money by her labor, and takes the pay, he cannot, on making his appearance, collect the pay over again;[2] and there can be no doubt that this doctrine is just. By leaving her with the capacity to work, and without other means of support, while the law casts on him the duty to maintain her, he must be presumed to intend that she shall use the capacity, and the money which flows therefrom.

§ 615. **Continued.** — It is difficult to resist the conviction that the following is the true distinction: If a husband abandons his wife, he leaves with her, what he cannot take away, the authority to pledge his credit for necessaries, but not to pledge his credit for any thing more. He leaves with her also the authority to deal with and dispose of all personal and other property which, in its nature, can be transferred with-

[1] Roteh *v.* Miles, 2 Conn. 638, 645, 647.

[2] Lawrence *v.* Spear, 17 Cal. 421; Norcross *v.* Rodgers, 30 Vt. 588.

out his deed, and which he voluntarily abandons in her hands, so far as the disposal of the property may be necessary for her support, and perhaps even further than this. And though he cannot carry with him the wife's capacity to earn money, while he leaves the presence of the wife behind, and therefore does not act quite voluntarily in intrusting this to her keeping; still, as he does voluntarily leave her, he must be conclusively held, when he so leaves her, to authorize her to receive and expend the products of her own labor. To go beyond this, and hold the husband bound by her acts as a presumptive agent, not merely for necessaries procured, but for other things, would violate, it is submitted, established and just principle.

§ 616. **Continued.** — Yet there is an Indiana case which holds, that, if a husband entirely abandons his wife and infant children, leaving them no other means of support than the cultivation of a small farm on which he had resided, the jury may infer from these facts (not merely an authority in the wife to take and use the proceeds of the farm and the like, but also) an authority in her to employ, on his responsibility for the wages, one of his minor sons, after becoming of age, to cultivate the farm for the sustenance of the family.[1] On the other hand, though perhaps not as being in conflict with any of the foregoing doctrines, it was held in Pennsylvania, that, where there is hostile feeling between a husband and his wife, and he has separated himself from her, the mere fact of her having in possession a bond due to him does not raise the presumption of his having delivered it to her to receive the interest upon it; nor does his having turned her away without having provided other means for her support raise such presumption.[2] And quite in harmony with what has already been laid down as the better rule, it was held, in Alabama, that, if a married woman, separated from her husband in another State, has come to this State, and has here by her industry for several years maintained herself and children, the husband meanwhile continuing away and asserting no

[1] Casteel *v.* Casteel, 8 Blackf. 240. And see Cropsey *v.* McKinney, 30 Barb. 47.

[2] Walker *v.* Simpson, 7 Watts & S. 83. And see Rogers *v.* Phillips, 3 Eng. 366.

claim to her acquisitions, she may, by an indorsement in her own name, pass her title to a bill or note made payable to her.[1]

§ 617. **Credit given to Wife.** — Where, though the husband might be made liable, the credit is given to a wife who has a separate estate, and not to the husband, plainly, on well-received principles, the husband will not be liable, even though he is cohabiting with the wife and sees the goods upon her.[2] This proposition is clearly correct; and perhaps the authorities would justify the further statement, that the result is the same where the wife has no separate property, and the vender trusts merely to the chance of a voluntary payment.[3] Yet the mere charging of the articles to the wife, in the trader's books of accounts, will not necessarily exempt the husband from liability to pay for them.[4]

§ 618. **Wife using Goods with Husband's Knowledge.** — Said Lord Ellenborough: "Where a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value. If they are not cohabiting, then he is, in general, only liable for such necessaries as from his situation in life it is his duty to supply her. But even where they are parted, if the husband has any control over goods improvidently ordered by the wife, so as to have it in his power to return them to the vender, and he does not return them, or cause them to be returned, he adopts her acts, and renders himself answerable."[5] On this principle it has been held, that, if goods are furnished to a wife living separate from her husband, under circumstances which would not make the husband liable, yet if on reconciliation the husband takes the goods and the wife,

[1] Roland *v.* Logan, 18 Ala. 307. And see further, on the general subject of these sections, Camerlin *v.* Palmer Company, 10 Allen, 539; Edgerly *v.* Whalan, 106 Mass. 307; Hill *v.* Sewald, 3 Smith, Pa. 271; Reynolds *v.* Sweetser, 15 Gray, 78; Burlen *v.* Shannon, 14 Gray, 433; Cunningham *v.* Reardon, 98 Mass. 538.

[2] Stammers *v.* Macomb, 2 Wend. 454; Black *v.* Bryan, 18 Texas, 453.

[3] Bentley *v.* Griffin, 5 Taunt. 356; Holt *v.* Brien, 4 B. & Ald. 252; Shelton *v.* Pendleton, 18 Conn. 417.

[4] Furlong *v.* Hysom, 35 Maine, 332. And see Wray *v.* Cox, 24 Ala. 337; Cropsey *v.* McKinney, 30 Barb. 47.

[5] Waithman *v.* Wakefield, 1 Camp. 120.

he must pay for the goods;[1] and, if he receives the goods home, promising to pay, he may be holden on this promise, even though it was obtained by the wife's deceitful practices, provided the vender was not a party to the deceit.[2]

§ 619. **Effect of Husband's offering to receive Wife — Making Allowance to Wife.** — The general doctrine has already been mentioned,[3] that the husband may supply his wife in his own way, with such necessaries as the law places him under obligation to provide.[4] But it has been held, that, if a husband has been guilty of adultery, and then his wife leaves him for this cause, he cannot free himself from the duty to pay for necessaries which a third person may furnish her, by offering her board and a separate apartment in his own house.[5] And we have already seen that a husband who sends his wife away with his credit, cannot limit her facilities for obtaining credit by forbidding a particular person to trust her.[6] Yet though a voluntary separation have its foundation in the misconduct of the husband, still, if he make her a suitable allowance and pay it, she does not then carry with her his credit.[7]

§ 620. **Burden of Proof.** — Various doctrines as to the burden of proof in these cases have been already mentioned.[8] If husband and wife are living separate, inasmuch as such separate living is just as consistent with a state of facts in which the husband would not be liable on her contracts for necessaries as with a state of facts in which he would be so liable, the creditor, who has trusted her on the husband's account, must prove the existence of the circumstances from which the liability springs. This proposition is so plain in itself, and the reason on which it rests is so obvious to the legal understanding, that nothing further need be said in its support. Yet there are a few cases which seem hardly to recognize this doctrine; while, in some other cases, the reason of the doctrine does not very

[1] Rennick *v.* Ficklin, 3 B. Monr. 166.

[2] Allen *v.* Aldrich, 9 Fost. N. H. 63.

[3] Ante, § 560.

[4] Morgan *v.* Hughes, 20 Texas, 141.

[5] Sykes *v.* Halstead, 1 Sandf. 483.

[6] Ante, § 572.

[7] Kemp *v.* Downham, 5 Harring. Del. 417. And see Fredd *v.* Eves, 4 Harring. Del. 385; Baker *v.* Barney, 8 Johns. 72; Cany *v.* Patton, 2 Ashm. 140; Harshaw *v.* Merryman, 18 Misso. 106; Mott *v.* Comstock, 8 Wend. 544.

[8] Ante, § 556, 560, 564, 567, 573, 579.

clearly appear, though, on the whole, it is abundantly supported by authority, both English and American.[1]

§ 621. **Money lent to buy Necessaries — Trader — Other Third Person.** — We have, in another connection, briefly considered the question, — What are necessaries?[2] Money may buy necessaries, but it is not such in itself. Therefore, if a man lends to a married woman, whose husband being under obligation to furnish her necessaries neglects so to do, money which she actually expends in this way, he cannot maintain an action at law against the husband for the money.[3] But it is not requisite the person who furnishes the necessaries should be a trader, in order to recover their price; any third person may buy the necessaries, deliver them to the wife, and then maintain his suit against the husband.[4] And in equity, — that is, in that form of legal proceeding which is carried on in a court of equity, in distinction from a court of common law, — the person who lends money to the wife with which to buy necessaries can recover the money, on showing that it has been so expended in fact.[5] This last proposition rests equally well on the older and on the later authorities. Thus, where the plaintiff had lent the wife £30 to be expended in necessaries, and she had so expended it, and the husband had devised his lands to trustees to pay his debts, and had then died, — the court held, in the time of Peere Williams's Reports, that this plaintiff, on a bill in equity against these trustees, could recover for the money so lent. "Admitting," said the court, "the wife cannot at law borrow money, though for necessaries, so as to bind the husband, yet this money being applied to the use of the wife for her care and for necessaries, the plaintiff that lent this money

[1] See, on this whole matter, Mainwaring *v.* Leslie, Moody & M. 18, 2 Car. & P. 507; Clifford *v.* Laton, 3 Car. & P. 15, 1 Moody & M. 101; Johnston *v.* Sumner, 3 H. & N. 261; Gill *v.* Read, 5 R. I. 343; Porter *v.* Bobb, 25 Misso. 36; Pool *v.* Everton, 5 Jones, N. C. 241; Hunter *v.* Boucher, 3 Pick. 289; Reese *v.* Chilton, 26 Misso. 598; Mott *v.* Comstock, 8 Wend. 544; Harshaw *v.* Merryman, 18 Misso. 106; Kemp *v.* Downham, 5 Harring. Del. 417; Cany *v.* Patton, 2 Ashm. 140; Mitchell *v.* Treanor, 11 Ga. 324; Cartwright *v.* Bate, 1 Allen, 514, 516; Billing *v.* Pilcher, 7 B. Monr. 458.

[2] Ante, § 554.

[3] Knox *v.* Bushell, 3 C. B. N. S. 334; Walker *v.* Simpson, 7 Watts & S. 83. And see Zeigler *v.* David, 23 Ala. 127.

[4] Gill *v.* Read, 5 R. I. 343; Mayhew *v.* Thayer, 8 Gray, 172.

[5] Deare *v.* Soutten, Law Rep. 9 Eq. 151; Walker *v.* Simpson, supra; and cases cited in the remaining notes to this section.

must in equity stand in the place of the persons who found and provided such necessaries for the wife. And therefore, as such persons would be creditors of the husband, so the plaintiff shall stand in their place, and be a creditor also." [1] And this doctrine has been confirmed by late English authority.[2]

§ 622. **Continued.** — There was indeed an equity case before Vice-Chancellor Shadwell, in which, where the creditor had brought his suit in equity directly against the husband for the money lent, and not against trustees, as in the case from Peere Williams, this learned judge refused to entertain the cause, upon the following distinction: "In the cases cited," he said, "there were trusts for payment of the husbands' debts; which gave the court jurisdiction; the only question was, whether the plaintiffs were creditors of the husbands. If they were, there could be no doubt that the court would execute the trusts in their favor. In this case, there is no trust to execute, but the plaintiff sues merely as a creditor of the husband; and, as a mere creditor, she has no equity against the husband." [3] But in the later case, before the higher court, cited to the last section, this distinction was not recognized, and the broader doctrine was maintained. Said Lord Chancellor Campbell: "An action at law" would not lie, &c.; for "courts of law will not recognize any privity between the husband and any person who has supplied his wife with money to purchase necessaries, or pays the tradespeople who have furnished them. Nevertheless it has been laid down from ancient times, that a court of equity will allow the party who has advanced the money, which is proved to have been actually employed in paying for necessaries furnished to the deserted wife, to stand in the shoes of the tradespeople who furnish the necessaries, and to have a remedy for the amount against the husband. I do not find any technical reason given for this, but it may possibly be that equity considers that the tradespeople have for valuable consideration assigned to the party who advanced the money the legal debt which would be due from the husband on furnishing the necessaries, and that, although a chose in action

[1] Harris *v.* Lee, 1 P. Wms. 482, 483. And see Marlow *v.* Pitfeild, 1 P. Wms. 558.

[2] Jenner *v.* Morris, 3 DeG., F. & J. 45, 1 Drew. & S. 218, 7 Jur. N. S. 375.

[3] May *v.* Skey, 16 Sim. 588, 589.

cannot be assigned at law, a court of equity recognizes the right of the assignee. Whatever may be the reason, the doctrine is explicitly laid down in Harris *v.* Lee," &c. Sir J. G. Turner, whose observations, in the report, follow those of the Lord Chancellor, grappled with the supposed difficulty in, perhaps, a better way; he said: "It is a very ancient head of the equitable jurisdiction of the court to interpose in cases in which the principles of the law give a right, but the forms of the law do not give a remedy. Now, what is the case here? It is beyond all question that the principle of the law is, that the husband deserting his wife is liable for necessaries supplied to her; but it is equally beyond question, that, if money be advanced to the wife to purchase necessaries, the money, although in fact so applied, cannot be recovered at law, because of the necessary forms of the action at law for the recovery of the money; the court of law cannot look beyond the advance, or enter into the application of the money."[1] Perhaps the true view of the reason is, that, according to the principles of our jurisprudence as recognized in all our courts, the husband ought to pay the money; that, according to immemorial usage, a court of law is not the proper tribunal in which to bring the suit, while a court of equity is the proper tribunal; therefore the precedents should be followed. When we talk of the heads of equity jurisdiction, we only attempt to classify the precedents; and although a judge may do such an ill considered thing as to deny a right admitted in principle, and sustained likewise by precedent, because he cannot classify the precedent, yet this is a doing not to be commended.

§ 623. **Town furnishing Necessaries to Wife as Pauper.**— Whether, when a wife is refused necessaries by her husband, the town acting through its officers having charge of the poor can supply them, and in an action at law compel the husband to refund, is a question which in another aspect has been already partly considered.[2] It was held, in Massachusetts, that in such a case the town may recover the amount requisite for the wife's support as a pauper, but nothing more for what might be

[1] Jenner *v.* Morris, as cited in the last section. The extracts given in the text are from the Jurist report.

[2] Ante, § 566.

deemed to be further due her by reason of her husband's condition and standing in life. "She does not," said Thomas, J., "carry to the town the credit of her husband."[1] On the other hand, in one of the New York courts, not so much as this was conceded; it being held, that the town could recover nothing of the husband; because, it was said, if her husband was able to support her, she was not a pauper.[2] In Ohio, the husband was held liable to the town.[3]

§ 624. **Wife as Witness.** — The doctrine is familiar, that, though a wife cannot in general be a witness against her husband, yet, if she is beaten by him, she may testify, in a criminal proceeding, against him as to the battery. But suppose, in a case of cruelty, she leaves him, and pledges his credit for necessaries, — Can she be a witness in behalf of the creditor? The Massachusetts court has held, that, prior to Stat. 1859, c. 230, she could not be.[4] In a New York case, upon a *habeas corpus* directed to the father-in-law of the husband, requiring him to bring before the Court of Chancery the wife and her infant child, it was held, that the wife was a competent witness for this defendant, to prove acts of cruelty committed by the husband on her, justifying her separation from the husband and her refusal to return to his house; also, that she could not testify to his general character, or to any misconduct in other respects. Said the learned chancellor, Walworth: "This is a question which, so far as I have been able to discover during the short time I have been allowed to examine the same, has never been distinctly decided by any court, either in this country or in England." After mentioning the general rule which prohibits a wife from being a witness against her husband, and the known exceptions to the rule, he proceeded: "She is permitted to be a witness in most of the cases excepted from the general rule, from principles of public policy, in order that he may be restrained from committing outrages against her, in the retirement of the family circle, under the supposition that he may do so with impunity. Whenever, therefore, the policy or

[1] Monson *v.* Williams, 6 Gray, 416.
[2] Norton *v.* Rhodes, 18 Barb. 100.
[3] Howard *v.* Whetstone, 10 Ohio, 365.
[4] Burlen *v.* Shannon, 14 Gray, 433. See Cooper *v.* Lloyd, 6 C. B. N. S. 519; Downing *v.* Rugar, 21 Wend. 178; Jacobs *v.* Whitcomb, 10 Cush. 255; Johnson *v.* Sherwin, 3 Gray, 374.

necessity of admitting her as a witness against her husband is sufficiently strong to overbalance the principle of public policy upon which the general rule of exclusion is based, she ought to be received as a witness, if she has no personal interest adverse to his which would of itself form a ground for her exclusion." [1] The rules of evidence are very arbitrary; yet it is difficult to see why, on principle, a wife should not be admitted to prove the ill conduct of her husband by reason of which she has been compelled to fly from his house, as well where the proceeding is a civil one as where it is criminal. If indeed there is to be allowed any exception to the rule which excludes her evidence, surely the exception should prevail where the question is, whether she shall live or starve in the place to which she has fled.

§ 625. **Wife's Declarations — Judgments — Action for enticing away Wife.** — To what extent the declarations of the wife, made at or about the time of leaving the house of her husband, assuming her not to be a competent witness, may, in these cases, and in actions by the husband against third persons for harboring her, and the like, be given in evidence, is a question which will best be considered when we come to treat of the evidence in divorce cases for cruelty.[2] So, in subsequent parts of these volumes, we can better consider than here, the effect of judgments in divorce cases upon this class of suits.[3] That an action may be maintained by the husband, against a third person, for enticing away his wife, where nothing in the nature of criminal conversation is alleged, is a proposition sufficiently sustained both in principle and in authority.[4] The practitioner who wishes to study the distinctions as to when such an action will lie, and when it will not, will find much help from consulting the authorities referred to in this section. The exact lines which the law draws with respect to this question are not very distinct. In some cases the sole inquiry would seem to be,

[1] People *v.* Mercein, 8 Paige, 47, 49, 52, 53.

[2] Gilchrist *v.* Bale, 8 Watts, 355; Jacobs *v.* Whitcomb, 10 Cush. 255; Johnson *v.* Sherwin, 3 Gray, 374; Preston *v.* Bowers, 13 Ohio State, 1, 11; Palmer *v.* Crook, 7 Gray, 418.

[3] See Burlen *v.* Shannon, 3 Gray, 387; Burlen *v.* Shannon, 14 Gray, 433; Day *v.* Spread, Jebb & Bourke, 163.

[4] Scherpf *v.* Szadeczky, 4 E. D. Smith, 110; Chancellor Walworth in People *v.* Mercein, 8 Paige, 47, 54; Bennett *v.* Smith, 21 Barb. 439; Barnes *v.* Allen, 30 Barb. 663; Babe *v.* Hanna, 5 Ohio, 530.

whether the wife was justified in leaving her husband. But if the defendant were her father, or other near relative, or perhaps if he were any disinterested third person, reason would seem to dictate, and some of the cases appear to hold, that, to render him liable, there must appear, not only a want of justification in the wife, but malice or intentional wrong in the defendant.

§ 626. **Dower after Elopement and Adultery — Stat. Westm. 2.** — The English statute of Westm. 2 (13 Edw. 1, stat. 1), c. 34, which in a sort of general way may be said to be common law in the United States, while in some of the States it has been expressly re-enacted,[1] provides, that, "if a wife willingly *leave her husband, and go away, and continue with her advouterer* (adulterer), she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon; except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action." The expositions of this statute, which is thus fully and exactly quoted, will be found elsewhere;[2] but it is to be observed, that they proceed upon rules differing in several particulars from those which determine the right of the husband to a divorce for the wife's adultery; and so, if there were no other objection, the sentence of separation could not of itself bar her of dower, though she may be otherwise barred on account of the same acts of adultery for which she is divorced. This distinction is important, and a failure to notice it has led to some apparent confusion in the books.[3]

§ 627. **Continued.** — On a more exact examination of this subject we see, that this statute of Westminster has not been received, or is not now deemed to be law, in Massachusetts,[4] Missouri,[5] and Rhode Island:[6] but it did, and probably still

[1] 1 Greenl. Cruise, 156, 175, notes; 4 Kent Com. 53. In New York the plea of elopement in bar of dower is taken away by the force of the Revised Statutes. Ib.

[2] 1 Greenl. Cruise, 175, 176; 2 Inst. 435, 436; Co. Lit. 32 *a*; Godol. Ab. 508; Govier *v.* Hancock, 6 T. R. 603.

[3] See Co. Lit. 32, note, 194; Park on Dower, 20, note; Roll. Ab. 680, 681; Shute *v.* Shute, Prec. Ch. 111; 2 Bright Hus. & Wife, 362.

[4] Lakin *v.* Lakin, 2 Allen, 45. That it was formerly held to be common law in this State, see ante, § 455.

[5] Lecompte *v.* Wash, 9 Misso. 547.

[6] Byram *v.* Batcheller, 6 R. I. 543.

does, have force in South Carolina[1] and New Hampshire.[2] How it stands in the other States, the writer is not able to say. The statute was re-enacted in New York, but it was repealed in 1830. The statute of repeal "has brought us back," said Bronson, J., "to the common law, as it stood before the statute of 13 Edw. I.; for, as we have already seen, adultery did not work a forfeiture at the common law. As to a divorce, *a vinculo*, that always put an end to the claim of dower; for, although it was not necessary that the seisin of the husband should continue during the coverture, it was necessary that the marriage should continue until the death of the husband."[3] This statute seems to be fairly enough within the general class of those English statutes which are parts of the common law of our States; but, owing to peculiar early or present legislation in some of the States, it is found to be repugnant in them to provisions of absolute law thus established, and therefore properly held not to be of force.

§ 628. **Continued.** — A single point, in the interpretation of this statute, may be here noticed. The words, if the act were a modern one, would seem pretty clearly to require, that, unless the two things, adultery and desertion in the wife, combined, she would not be barred of her dower. In a late English case, however, it was held, that a woman driven away from her home by her husband's cruelty — a case clearly not of desertion in her, but more nearly desertion in him — forfeits her dower by adultery without reconciliation. "The best construction of the statute," said Willes, J., "seems to be, that the leaving *sponte* is not the essence of the offence which leads to the forfeiture. It is enough, if, having left her husband's house, the woman afterwards commits adultery."[4] This decision proceeded very much upon the exposition of Lord Coke,[5] as being matter of settled law. In an Upper Canada case, where the husband had first deserted his wife and then she had lived in adultery, she was held not to be barred.[6] And it

[1] Bell *v.* Nealy, 1 Bailey, 312.
[2] Cogswell *v.* Tibbetts, 3 N. H. 41.
[3] Reynolds *v.* Reynolds, 24 Wend. 193, 197.
[4] Woodward *v.* Dowse, 10 C. B. N. S. 722, 732.
[5] 2 Inst. 435.
[6] Graham *v.* Law, 6 U. C. C. P. 310.

may be doubtful, whether either respect for ancient expositions, or any just modern view of the words, should lead to a decision differing from this Canada one.[1]

§ 629. **Forfeiture of Interest in Husband's Estate — "Living in Adultery."** — The Indiana statute providing, that, "if a wife shall have left her husband, and shall be living at the time of his death in adultery, she shall take no part of the estate of her husband;" the court held a wife not to be barred, where there was but a single adulterous act.[2]

CHAPTER XXXVII.

SEPARATION UNDER ARTICLES.

§ 630. **Scope of this Discussion — How the Chapter divided.** — Those who wish to learn on what principles, and within what limitations, the law upholds contracts between husband and wife after marriage, whether with or without the intervention of a trustee, are referred to the author's work on the "Law of Married Women." The object of this chapter is the practical one of drawing in general outline the English doctrine relating to separations under articles, and then inquiring to what extent the doctrine thus ascertained is accepted in the United States. What is to be said, therefore, may be arranged under the three following heads: I. The Doctrine in Legal Principle; II. The Doctrine as held in England; III. The Doctrine as received in our several States.

[1] And see Cogswell *v.* Tibbetts, 3 N. H. 41. According to a Delaware case, a wife does not forfeit dower by eloping from her husband and living in adultery with another man, if the husband was guilty of adultery and caused her to leave him by his cruelty, neglect, and abandonment. Rawlins *v.* Buttel, 1 Houston, 224.

[2] Gaylor *v.* McHenry, 15 Ind. 383. See also, in this connection, Earle *v.* Earle, 9 Texas, 630; Sistare *v.* Sistare, 2 Root, 468; Potier *v.* Barclay, 15 Ala. 439.

I. *The Doctrine in Legal Principle.*

§ 631. **Separations against Policy of Law — Agreements to separate void.** — A man and woman who enter into the relation of marriage place themselves thereby under the law of marriage, as received in the community in which they dwell. And it is a cardinal principle of this law among us, that, having entered into the matrimonial bond, they cannot annul it, except for the causes and in the manner prescribed by law. And when they proceed thus to unloose the bond, the court to which application is made requires proof of the causes, by evidence other than the mere admissions of the parties themselves. Thence it follows, that no agreement between the two for a divorce, or for half a divorce, or for any fractional part of a divorce, can be valid in law. No agreement operating collaterally, in such a way as indirectly to effect the same object, can be of any force. A court cannot countenance such an agreement, cannot wink at it, cannot permit it to be of avail, even for a lawful purpose which may be found inseparably connected with the unlawful.

§ 632. **Husband to maintain Wife.** — But there is another principle just as distinct in our law as the one laid down in the last section; namely, that a husband cannot avail himself of his own wrong to free himself from the duty to maintain his wife. So also, of course, though the husband has committed no wrong, he may contribute of his means to support his wife, even though the wife be erring.

§ 633. **From what the Doctrine of Separation under Articles proceeds.** — Out of the two distinct and several principles brought to view in the last two sections, comes the entire doctrine of separations under articles. When we look at the cases, we find that they are sometimes discordant, and sometimes the particular decision proceeded on a misapprehension of true legal distinctions; but, on the whole, the law as adjudicated both in England and the United States is the mere sequence of these two principles. Let us examine, therefore, the matter as it rests on adjudication.

II. *The Doctrine as held in England.*

§ 634. **Whether Articles bar Suit for Restitution of Conjugal Rights.** — In accordance with one of the principles above laid down, it has become settled law in England, where the suit for the restitution of conjugal rights has always been and still is allowed, that, though in articles of separation the party covenants not to bring this suit against the other party to compel cohabitation, yet the covenant has no binding force, at least it has none in the matrimonial court, and the suit may be maintained the same as though the covenant had not been made.[1] In one case where there was an attempt to plead, in the ecclesiastical court, articles of separation in bar of a suit for the restitution of conjugal rights, Lord Stowell observed: "The objection taken against these articles is, that deeds of separation are not pleadable in the ecclesiastical court; and most certainly they are not, if pleaded as a bar to its further proceedings; for this court considers a private separation as an illegal contract, implying a renunciation of stipulated duties, — a dereliction of those mutual offices which the parties are not at liberty to desert, — an assumption of a false character, in both parties, contrary to the real *status personæ*, and to the obligations which both of them have contracted in the sight of God and man, to live together 'till death them do part;' and on which the solemnities both of civil society and religion have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient, and sufficiently proved."[2] In another case Sir John Nicholl employed the broad language: "Any private understanding or agreement [between husband and wife] to live separate is not recognized by the law."[3]

[1] Mortimer *v.* Mortimer, 2 Hag. Con. 310, 318; Barlee *v.* Barlee, 1 Add. Ec. 301, 305; Lord Brougham in Warrender *v.* Warrender, 2 Cl. & F. 488, 561; Westmeath *v.* Westmeath, 2 Hag. Ec. Supp. 1, 44; Smith *v.* Smith, 2 Hag. Ec. Supp. 44, note; Spering *v.* Spering, 3 Swab. & T. 211; Brown *v.* Brown, Law Rep. 7 Eq. 185; Anquez *v.* Anquez, Law Rep. 1 P. & M. 176.

[2] Mortimer *v.* Mortimer, supra, p. 318.

[3] Smith *v.* Smith, 4 Hag. Ec. 609, 514. And see King *v.* Sansom, 3 Add. Ec. 277, 281; Beeby *v.* Beeby, 1 Hag. Con. 142, note; Westmeath *v.* Westmeath, Jacob, 126, 136.

§ 634 *a*. **Continued.** — There is, however, an English case in which the Lord Chancellor, reversing a decree of the Master of the Rolls, held, that equity will restrain a party from prosecuting a suit for the restitution of conjugal rights if he has covenanted in articles of separation not to bring such a suit.[1] This case was taken by appeal to the House of Lords, and there argued, but the woman died and no decision was rendered.[2] The judgment of the Lord Chancellor was certainly an extraordinary one; for, in the first place, it was a departure from all principle and from precedent to permit married parties to modify by a valid agreement their matrimonial *status*, which ought to be regulated by public and general rules of law, and not by private contract; and, in the second place, the subject was exclusively within the jurisdiction of the matrimonial court and not the courts of equity, and there was no proper ground upon which equity could interfere. To enforce, in any tribunal, a private agreement in aid of marriage might be different; but this was an agreement in aid of its practical dissolution, and therefore contrary to the policy of the law.[3]

§ 635. **Condition to live separate — Generally as to Separation Deeds.** — Again, as showing the policy of the law to be against permitting parties practically to abrogate their status of marriage by a private agreement, it may be mentioned, that, in England, when a legacy is left to a married woman on the condition of her living apart from her husband, the condition is contrary to good morals, and therefore void; consequently she will take the legacy discharged of the condition.[4] In short, Lord Brougham in one case, speaking of deeds of separation, said: "What is the legal value or force of this kind of agreement in our law? Absolutely none whatever — in any court whatever — for any purpose whatever, save and except one only, — the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*.

[1] Hunt *v.* Hunt, 31 Law J. N. S. Ch. 161, 172; De G. F. & J. 221, 225.

[2] Rowley *v.* Rowley, Law Rep. 1 H. L. Sc. 63; Brown *v.* Brown, Law Rep. 7 Eq. 185.

[3] And see the cases cited in the last note. See, also, on the general subject of this section, Williams *v.* Baily, Law Rep. 2 Eq. 731; Thomas *v.* Everard, 6 H. & N. 448.

[4] Brown *v.* Peck, 1 Eden, 140. And see Westmeath *v.* Westmeath, Jacob, 126, 137.

In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach, no specific performance of its articles can be decreed. No court, civil or consistorial, can take notice of its existence. So far has the legal presumption of cohabitation been carried by the common-law courts, that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the fact of living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife, — nay, even where he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him, — all is utterly insufficient to repel the claim which he makes for the loss of her society without doing any act, either in court or *in pais*, to determine the separation or annul the agreement."[1]

§ 636. **Two Purposes of Separation Deed — Cessation of Cohabitation — Support to Wife — Not Restitution of Conjugal Rights — Present Separation.** — There are two purposes, therefore, which have been attempted to be effected by deeds of separation; the one, to secure to the parties, or to the party asking the separation, the right to abandon the matrimonial cohabitation; the other, to secure to the wife a support from her husband. To effect the former of these purposes, the deed is utterly powerless; to effect the latter, it may be good or not according to the circumstances and to the structure of the deed. But, suppose the deed attempts more than it can lawfully accomplish, is it therefore void in whole, or void only as to the unlawful part? Here, in this question, the difficulties connected with our subject appear. The decisions relating to this question have fluctuated; but it seems to be conceded that the insertion of what may be called the impossible matter, or, in other words, the illegal matter, does not in all instances make the instrument wholly void.[2] For example, these deeds

[1] Warrender *v.* Warrender, 2 Cl. & F. 488, 527.

[2] Byrne *v.* Carew, 13 Irish Eq. 1. See Elworthy *v.* Bird, 2 Sim. & S. 372.

of separation often contain, in England, such provisions as that the party shall not bring a suit for the restitution of conjugal rights, and the like, — "the ordinary class of provisions," observes Sir John Nicholl, "for enforcing, so far as may be, the continuance, and preventing the determination, of the separate state in which the parties covenant to live, ... which, nearly in all cases, find their way into deeds of this nature, though nugatory as to any binding effect on the parties in this particular," [1] — yet the writer is not aware that this class of provisions, made in cases where a separation has already taken place, have been generally held to bar the wife of the separate maintenance secured by the deed. And there is even a late English case wherein such provisions seem to be looked upon with no disfavor, and a sort of validity is apparently given to them.[2] There are other cases having a similar aspect.[3]

§ 637. **Future Separation.** — Suppose, on the other hand, the deed provides for a future separation, — not merely for a support to the wife after a separation has already taken place, or been determined upon, — in this case, the promised provision being made to depend, as its condition, on the future doing of an act contrary to the policy of the law, the deed will be pronounced wholly void.[4] Such a case as this falls within the same reason as the one, already mentioned,[5] of a legacy left to a married woman on condition of her living apart from her husband; but there, as the condition can be separated from the rest, it only is void; here, as the main matter rests upon the condition, the main matter drops. Likewise when no separation actually takes place the deed is void.[6] And perhaps what we see here will teach us the true distinction between cases in which the illegal matter, or matter contrary to the policy of the law, will render the whole deed void, and those in which it will not. If the lawful rests upon the unlaw-

[1] Sullivan *v.* Sullivan, 2 Add. Ec. 299, 303, 304.

[2] Wilson *v.* Wilson, 31 Eng. L. & Eq. 29, 1 H. L. Cas. 538, 5 H. L. Cas. 40. And see ante, § 634 *a*.

[3] See, among other cases, Sanders *v.* Rodway, 16 Beav. 207.

[4] Durant *v.* Titley, 7 Price, 577; Jee *v.* Thurlow, 2 B. & C. 547, 551; Hindley *v.* Westmeath, 6 B. & C. 200; Westmeath *v.* Salisbury, 5 Bligh, N. R. 339.

[5] Ante, § 635.

[6] Bindley *v.* Mulloney, Law Rep. 7 Eq. 343.

ful, the whole falls. But if the lawful stands independent of the unlawful, it may continue to stand, though the latter is null, or more than null.

§ 638. **Property Interests.** — We see, therefore, that the main matter connected with these deeds of separation relates to the separate property interest which the deed secures to the wife, an interest which is often equally secured during a cohabitation; therefore it would not be wise to enter into a further consideration of this particular branch of the subject, though it be its main branch, in these volumes. The foregoing sections present the principles on which the cases proceed. But the English books contain multitudes of minor points not here stated, and cases not here referred to. Let us bring under review some of the American cases; extending, in such review, our inquiries somewhat further into the American law than in these sections we have done into the English; and so close the chapter.

III. *The Doctrine as received in our several States.*

§ 639. **General View.** — It may be observed, in general terms, that separations under articles are much less frequent in the United States than they appear to be in England, and that they are certainly not more favored by the courts here than there, and perhaps are not as much favored. So far, however, as American decisions have covered the ground, they differ considerably in the different States. There is nothing which may be called an American law on the subject. It will consequently be the purpose of the remaining sections of this chapter to present a brief digest, in the order of the States, of points which have been decided therein.

§ 640. **Alabama.** — It was held in this State, that a married woman, living apart from her husband, and owning a separate estate by deed, cannot, at common law, make any contract on which she or her personal representatives can be sued at law; and that this principle of the common law is not affected by any statutory provision. Yet it was observed by Rice, C. J.: "By such contract she may charge her separate estate, and

authorize a court of equity to enforce it as such a charge; but a court of law cannot enforce such a contract." [1]

§ 641. **California.** — It has been in this State laid down as well-established doctrine, that a valid agreement for an immediate separation between husband and wife, and for a separate support to the wife, may be made through the medium of a trustee; and the agreement will be upheld if immediately followed by actual separation. But if the parties after the separation become reconciled, and live together, this will avoid the deed, the consideration failing.[2]

§ 642. **Connecticut.** — It was by the majority of the court held in this State, that an action will lie against the husband, in the name of the trustees, on articles of separation.[3]

§ 643. **Georgia.** — A valid agreement — it was in this State held — may be made between husband and wife through the intervention of a trustee, for an immediate separation, and for a separate allowance to the wife for her support.[4]

§ 644. **Indiana.** — On the separation of husband and wife, — so it has been held in this State, — the husband having bound himself by deed to pay to a trustee a certain sum annually for four years, for the maintenance of the wife, reserving to himself the right to deduct from the amount whatever he should be compelled to pay for debts she might subsequently contract, — the contract is binding and may be enforced against him.[5] An agreement relating to a separation may be good without the intervention of a trustee. And where it is fully executed on the part of the husband, and it is reasonable, and the consideration is good, it may be upheld in equity though it was by parol.[6]

§ 644 *a*. **Iowa.** — In this State, deeds of separation through the intervention of trustees are good. Thus, where, in such a deed, the husband stipulated to pay an annual sum to the wife for her release of all right of dower in his lands, and for being held

[1] Parker *v.* Lambert, 31 Ala. 89. See also Moss *v.* McCall, 12 Ala. 630; Pinkston *v.* McLemore, 31 Ala. 308. As to the power of a married woman to charge her separate estate, see 1 Bishop Mar. Women, § 840 et seq.

[2] Wells *v.* Stout, 9 Cal. 479.

[3] Nichols *v.* Palmer, 5 Day, 47. And see Deming *v.* Williams, 26 Conn. 226.

[4] Chapman *v.* Gray, 8 Ga. 341.

[5] Reed *v.* Beazley, 1 Blackf. 97.

[6] Dutton *v.* Dutton, 30 Ind. 452.

harmless from her debts, it was adjudged that a suit might be maintained by the trustee against the husband on the deed.[1] And in various circumstances this sort of deed will be upheld, where no oppression has been exercised upon the wife and there is no fraud.[2]

§ 645. **Kentucky.** — Where, in this State, husband and wife entered into a written agreement for a separation, the husband conveying certain property to the wife without the intervention of a trustee, it was held that no suit for a breach of the agreement could be maintained against the husband.[3] In another case, on a bill in equity to enforce an agreement for separation against the husband, the court refused to sustain the complaint. Said Robertson, C. J.: "We concur with the chancellor in the opinion, that the contract of separation between [the husband] and his wife should not be enforced by decree, on her bill filed for that purpose; such contracts being generally inconsistent with public policy, and there being no proof in this case that there was any such cause for the separation as would have authorized a court of equity to decree a divorce, or would have justified a voluntary separation by contract."[4] According to another Kentucky case, when a wife without legal cause abandons her husband, and articles of separation are entered into with a trustee for the wife, in which the husband provides for her as well as the court would compel him to, in consideration of which she relinquishes right of dower and distribution in his estate, and the parties continue to act upon this until the husband dies, it is too late for her to complain or seek to repudiate the provision made for her and demand dower and distribution.[5]

§ 646. **Maryland.** — It has been held in this State, that a court of equity will not compel a husband living apart from his wife, under an agreement of separation made without the intervention of trustees, and containing no covenant of indemnity against the wife's debts, and no provision allowing her to transfer the title to real estate therein set off to her, to consum-

[1] Goddard *v.* Beebe, 4 Greene, Iowa, 126.

[2] Robertson *v.* Robertson, 25 Iowa, 350.

[3] Simpson *v.* Simpson, 4 Dana, 140. See Crostwaight *v.* Hutchinson, 2 Bibb, 407.

[4] McCrocklin *v.* McCrocklin, 2 B. Monr. 370.

[5] Loud *v.* Loud, 4 Bush, 453.

mate, by his deed, a title in lands which she had attempted by her separate deed to convey.[1] According to the facts of another case, wherein there was no trustee, there was between a husband and his wife an agreement which stated, that the two had separated, and that a certain fund, which stood in the name of a third person as a deposit for the wife in a savings bank, was claimed by both parties, therefore, to settle the dispute, the matter was arranged in a way pointed out. After the death of both parties, it was held that the agreement was to be deemed to have been binding, at least on the husband; and the wife having continued to take advantage of it after his death, and thereby ratified it, her representatives were bound by it also.[2] And there are other Maryland cases in which effect has been given, under differing circumstances, to agreements of separation.[3]

§ 646 *a*. **Massachusetts.** — In this State, a husband and his wife separated, and the former gave to the wife's father a bond, taking back another in turn. Provision was made for the custody of the children and the division of the property of the parties. Arbitrators were to determine "what allowance shall be made and paid by the said Willard to the said Alice by way of alimony for her support and maintenance during the existence of the coverture between them;" and the arbitrators decided that he should pay her "fifteen dollars quarterly as long as the decision of the arbitrators should remain," to be used for the support of herself and daughters, "or otherwise as if she were a *feme sole*." The wife having died, leaving arrears unpaid by the husband, the court decided, that this quarterly sum was not to be viewed as in the nature of technical "alimony," or of pin-money, but as separate estate; consequently, she having disposed of all her property otherwise than to her husband, as she was authorized by the agreement to do, the husband was liable to her representatives for the arrears.[4]

§ 647. **Mississippi.** — An agreement of separation between a husband and wife, without the intervention of a trustee, has been held in this State to be void for every purpose.[5] Thus

[1] Lippy *v.* Masonheimer, 9 Md. 310.
[2] McCubbin *v.* Patterson, 16 Md. 179.
[3] Brown *v.* Brown, 5 Gill, 249; Helms *v.* Franciscus, 2 Bland, 544; Hutchins *v.* Dixon, 11 Md. 29.
[4] Holbrook *v.* Comstock, 16 Gray, 109.
[5] Carter *v.* Carter, 14 Sm. & M. 59;

in one case of this sort it was observed: "The court [below] erred in permitting the agreement to live separate to go to the jury. Such agreements have no validity. It is true, that both courts of equity and courts of law have gone so far to enforce contracts for separate maintenance as to compel payment of the sum agreed on; but this is not on the ground that the agreement to live apart is binding, or tended to dissolve the marriage. They can have no such effect. Such agreements, when made through a trustee, are held to be binding so far as to give the remedies provided by the agreement. This agreement was not through a trustee." [1] In a later case, the same doctrine was confirmed; and it was held, that, if there is a trustee, still the wife's personal covenant running to the husband and trustee does not bind her. Consequently if in this way she relinquishes all claim to her husband's property, she is not thereby barred of her dower. Said Ellett, J.: "An agreement of this character, made between the husband and wife alone, is void, on account of the incapacity of the wife to bind herself by contract, or to take any thing by deed or contract directly from her husband. Agreements of separation between husband and wife are only valid when made through the agency of a trustee acting for the wife. The husband will in such cases be bound by his covenants or conveyances to the trustee, for the benefit of his wife, and the trustee will be bound by any covenants entered into by him, on the part of the wife, to indemnify the husband against liability for her support, or for her debts, and against her claims on his property. A married woman, as a general rule, can make no contract. She cannot be estopped by her covenant, nor bound by her deed of conveyance. The exceptions to this rule must be created by positive law. Thus by our statutes, a married woman may purchase property with her own money, and may make certain contracts, binding on her separate estate, for her support, or the support, management, and improvement of such separate property."

§ 648. **Missouri.** — In one case in this State, the very famil-

Tourney *v.* Sinclair, 3 How. Missis. 324. See, however, Wells *v.* Treadwell, 28 Missis. 717.

[1] Tourney *v.* Sinclair, supra, p. 326, 327, opinion by Sharkey, C. J.

[2] Stephenson *v.* Osborne, 41 Missis. 119, 124, 125.

iar doctrine everywhere received was laid down, that articles of separation are no bar to a suit for divorce, if, as in the case under consideration, one of the parties after the execution of such articles commits adultery.[1] The court in another case decided, that a slave conveyed to a married woman after a mutual separation cannot be held in prejudice of the husband's rights, the separation not being authorized by law.[2] It was observed in an equity suit in this State, involving the like principle: "The articles of separation were entered into, if not against the express provisions of both the civil and common law, at least without the sanction of either, and against what this court is pleased to consider the soundest principles of morality and of social policy. And though the English Courts of Chancery have, of late, gone great lengths in lending their aid to the execution of such contracts, we feel no disposition to follow their example at present; and sincerely hope, that the time is far distant when the condition of society may make it proper for American courts to do so."[3]

§ 649. **New Jersey.** — According to a decision in this State, if a husband by articles of separation places money in the hands of trustees for "the sole and separate use of the wife, and to be subject to her sole order and disposition;" but the trustees do not sign the articles, in consequence of which omission they become wholly inoperative as an agreement; yet, if the wife upon the faith of these articles lives apart from her husband, and at her death makes a testamentary disposition of the money, her administrator may recover it of the trustees, and her husband will not be entitled to it.[4] In another case the English doctrine seems to be recognized, that, if the allowance made to a wife in a deed of separation is not paid, a person furnishing her with necessaries can recover the price of them of the husband.[5]

§ 650. **New York.** — There are more cases on this subject in New York than in any other State of our Union. These cases

[1] Stokes *v.* Stokes, 1 Misso. 324.

[2] Chouteau *v.* Donchouquette, 1 Misso. 669.

[3] Gonsolis *v.* Donchouquette, 1 Misso. 666, 668, opinion by Wash, J.

[4] Emery *v.* Neighbour, 2 Halst. 142.

[5] Miller *v.* Miller, Saxton, 386, 394. See ante, § 580.

recognize the general doctrine of the validity, in the sense already explained, of deeds of separation entered into through the intervention of trustees;[1] but, for the deed to be valid, the separation contemplated must be an immediate and not a future one.[2] In general it may be said, that an agreement between husband and wife to live separate is an illegal agreement;[3] it is no bar to a divorce;[4] yet collateral undertakings, — as, for instance, the undertaking to support the wife, — though accompanied by the mutual promise to live separate, may bind the husband.[5] Evidently, in these cases as any other, an executory agreement, to lay the foundation for a suit, must be based on a sufficient consideration; but, where a husband conveys property to a trustee for his wife's separate use, and the trustee is put in possession, this executed transaction is valid, viewed as a mere gift.[6] In one case it was held, that a release by the husband, in an action of slander commenced by the wife, in the name of husband and wife, is effectual, though the husband and wife are living apart under articles made through the intervention of a trustee, and the husband stipulates in the articles not to interfere with her, and to permit her to prosecute suits in this way.[7] If the parties come together after a separation under articles, this puts an end to the articles, and the subsequent abandonment of the wife by the husband does not revive them.[8]

§ 651. **North Carolina.** — Where, in this State, a wife was separated from her husband; and it was agreed between the husband and the brother of the wife, that, for a valuable consideration mentioned, the husband should deliver to this brother three negroes for the sole and separate use of the wife, and the negroes were accordingly delivered, then the

[1] Heyer *v.* Burger, Hoffman, 1; Carson *v.* Murray, 3 Paige, 483; Wallace *v.* Basselt, 41 Barb. 92.

[2] Florentine *v.* Wilson, Hill & Denio, 303; Calkins *v.* Long, 22 Barb. 97.

[3] Rogers *v.* Rogers, 4 Paige, 516.

[4] Ib.; Anderson *v.* Anderson, 1 Edw. Ch. 380.

[5] Champlin *v.* Champlin, Hoffman, 55; Anderson *v.* Anderson, supra; Fenner *v.* Lewis, 10 Johns. 38; Heyer *v.* Burger, Hoffman, 1; Calkins *v.* Long, 22 Barb. 97; Cropsey *v.* McKinney, 30 Barb. 47. And see Simmons *v.* McElwain, 26 Barb. 419.

[6] Griffin *v.* Banks, 37 N. Y. 621.

[7] Beach *v.* Beach, 2 Hill, N. Y. 260.

[8] Shelthar *v.* Gregory, 2 Wend. 222. And see Heyer *v.* Burger, supra; Carson *v.* Murray, 3 Paige, 483. See also on the general question of these articles, Mercein *v.* People, 25 Wend. 64; People *v.* Mercein, 3 Hill, N. Y. 399.

wife became reconciled to her husband, — the court held this brother to be still, as respects these negroes, the trustee of the wife, under the duty to account to her for them, as for her sole and separate use, yet with the right to be reimbursed for such sums as he had advanced to her.[1]

§ 652. **Ohio.** — Articles providing for an immediate and present separation were held in this State not to be void as against public policy.[2]

§ 653. **Pennsylvania.** — Where, in this State, a husband by articles of separation stipulated with trustees, that his wife "should have all the rights of a *feme sole*, wholly freed and discharged from his power, restraint, and authority," in consideration, among other things, that the trustees should indemnify him against all future liabilities; in pursuance of which agreement the wife, by her unaided labor of twenty-five years, accumulated some personal estate, which she bequeathed by will; and, after her decease, the husband consented to the admission of the will to probate; and on his death his executors claimed the balance of her personal estate against the legatees under her will; this will of the wife was held to be valid, and her personal estate was ordered to be distributed according to its directions.[3] There are, in this State, some other cases wherein the effect of articles of separation upon property rights is considered.[4] In one of them it was observed: "It seems to be settled, that chancery will not execute an agreement between husband and wife to live separate; because that would impair the marital rights of the husband at the common law, by giving the wife a degree of personal independence which would be inconsistent with her conjugal duties. Nothing will be done in furtherance of even a suspension of the marriage contract; and a bill to compel the husband to permit the wife to live separate, or pay the stipulated maintenance, would not be entertained." But in the facts of the case, to which these observations

[1] Huntly *v.* Huntly, 6 Ire. Eq. 514. And for further points see Picket *v.* Johns, 1 Dev. Eq. 123; Elliott *v.* Elliott, 1 Dev. & Bat. Eq. 57.

[2] Bettle *v.* Wilson, 14 Ohio, 257.

[3] Wagner's Estate, 2 Ashm. 448.

[4] Lehr *v.* Beaver, 8 Watts & S. 102; Duffy *v.* The Insurance Co., 8 Watts & S. 413; Fisher *v.* Filbert, 6 Barr, 61; Hitner's Appeal, 4 Smith, Pa. 110; Bouslaugh *v.* Bouslaugh, 17 S. & R. 361.

were directed, there was no trustee, and the agreement was merely between husband and wife alone.[1] Still it was held, in another case, that, though at law no contract can be effectual between husband and wife without the intervention of trustees, yet in equity, if the contract is reasonable, and has been consummated, it may then be sustained. Therefore a property arrangement, made on separation between the parties, with no trustee, and acted upon during their lives, was held to be binding after the death of one of them. Said Rogers, J.: "The agreement here contemplates an immediate separation; it was carried into effect in good faith by the husband, has nothing unreasonable in it; and consequently the wife, after the death of the husband, is not entitled to the aid of the court, in any attempt to violate it."[2] Another case holds, that a clause of indemnity to the husband by the trustees, against debts to be contracted by the wife, though usually found in articles of separation, is not essential to their validity.[3]

§ 654. **South Carolina.** — A settlement by a husband upon his wife, on a separation, has been held in this State to be valid against his prior creditors, where the trustee covenants to save him harmless from debts she may contract.[4] In another case, a husband's bond to his wife's trustee, reciting that he and the wife had agreed to live separate, and conditioned to pay the trustee a certain annual sum for the use of the wife, was held to be good. The court below had admitted parol testimony to show that there had been a separation, and a suit in equity for alimony, and that this bond was given in compromise of that suit. And this was held to be correct.[5]

§ 655. **Tennessee.** — A husband and his wife having agreed in this State to live separate, he conveyed to trustees one third of his property in trust for her separate maintenance. The trustees covenanted, that she should not claim any more of his estate; and, if she did, and obtained it, they would indemnify

[1] McKennan *v.* Phillips, 6 Whart. 571, opinion by Gibson, C. J. See ante, § 647.

[2] Hutton *v.* Hutton, 3 Barr, 100. And see, for analogous points, Walsh *v.* Kelly, 10 Casey, 84; Dillinger's Appeal, 11 Casey, 357.

[3] Smith *v.* Knowles, 2 Grant, 413.

[4] Hargroves *v.* Meray, 2 Hill Ch. 222.

[5] Buckner *v.* Ruth, 13 Rich. 157.

him and his legal representatives. It was held, after the death of the husband, that this transaction did not bar the wife of her dower and distributive share; yet that she could not claim these, and at the same time claim the benefit of the settlement for her separate maintenance, but she must elect which she would hold; that the filing of a bill for dower and the distributive share was an election to take them and abandon the settlement; and that she was accountable for the trust property expended by her after her husband's death, but not for what was used before. It was also observed: "The trustees have no control of Mrs. Watkins's [the wife's] acts, yet the court will see them secured from injury, precedent to affording the relief prayed, so that they may not be subject to the suit of Dr. Watkins's representatives, by force of the decree and process of the court." [1]

§ 656. **General Views — Conclusion.** — The foregoing digest of points decided in the courts of our several States will show, that, on the one hand, the tribunals of this country accord a certain validity to articles of separation; and, on the other hand, these articles are limited in their effect. Whatever a husband might do, by way of making a settlement upon his wife, if the parties were living together, he may do when, upon an agreement of immediate separation, or after such a separation has taken place, he contemplates a probable continuation of this state of things, and desires, either from a good or an evil motive, not to see his wife left destitute. And there is no distinct authority for saying, that our American courts will go an inch further than this, in upholding these separations. If an attempt should be made to carry an American tribunal further, it would be an attempt, without any clear American precedent, to accomplish an object contrary to the whole spirit and policy of our jurisprudence.

[1] Watkins *v.* Watkins, 7 Yerg. 283, 294, 295, opinion by Catron, C. J. And see Parham *v.* Parham, 6 Humph. 287; Goodrich *v.* Bryant, 5 Sneed, 325.

BOOK VI.

LEGISLATIVE MARRIAGES AND DIVORCES.

CHAPTER XXXVIII.

LEGISLATIVE MARRIAGES.

§ 657. **General Doctrine.** — In the earlier parts of this volume[1] we saw, that it has never been anywhere the custom of legislation to impose upon parties the status of marriage without their consent. From this proposition it might seem, at the first impression, to follow, that there is no such thing practically known as a legislative marriage. Yet in truth there are legislative marriages, the same as there are legislative divorces; and the latter are no more than the former granted, in practice, without the consent of at least one of the parties. Still, a legislative marriage is not, in the facts of cases, such in the fullest sense of the expression; it consists merely in removing some legal obstacle whereby the consent of the parties, which the law in all cases recognizes as the essence of matrimony, was prevented from working its appropriate and wished-for result.

§ 658. **Illustrations of the Doctrine — Constitutional Questions.** — It is obvious that there may be circumstances in which this kind of legislation is highly beneficial. Thus, if a statute renders it essential to the validity of marriages that they be celebrated by a particular official person, and, after a marriage has been in good faith celebrated, some defect in the official qualifications of the celebrator is discovered, another statute may very properly remove this defect and declare the marriage good. It promotes public order by carrying out the

[1] Ante, § 3, 11, 12, 19, 93–95.

intent of the parties.[1] Where the legislative body is unrestrained by written constitutions, as it is in England, all sorts of enactments of this nature, which the legislature can be induced to make, whether wise or unwise, really accomplish what upon their face they undertake to do. But in this country, where our State legislatures are uniformly bound by written constitutions, there may sometimes a question arise, whether the act of marriage was constitutional. It has been held with us, that a marriage, void for want of legal authority in the person who celebrated it, may be rendered valid by subsequent legislation, though the effect may be to transfer immediately the settlement of a pauper from one town to another; yet that a town, thus newly charged, cannot be thereby compelled to pay for support furnished the pauper before the passage of the act.[2] Also, that a marriage, void because contracted within the prohibited degrees, may be confirmed by a subsequent legislative act. The court in this case observes: "The disability was a statutory one, and is removed by statute. The legislature has power to declare what shall be valid marriages. They can annul marriages already existing, *a fortiori* they can render valid, marriages which, when they took place, were against the law. They can exercise the power of marriage, or delegate it to others. The whole subject is one of legislative regulation." This case contained the element, that the husband and wife had jointly applied to the legislature to have the marriage confirmed.[3] In Massachusetts the following statute was held to be constitutional; and the statute likewise was construed to apply to existing marriages, as well as to marriages afterward celebrated: "The validity of a marriage shall not be questioned in the trial of a collateral issue, on account of the insanity or idiocy of either party, but only in a process duly instituted, in the lifetime of both parties, for determining such validity." "We cannot," said Metcalf, J., "see any difference in principle between this case and those in which the legislature have passed statutes declaring marriages valid, which were before

[1] Goshen *v.* Stonington, 4 Conn. 209.

[2] Brunswick *v.* Litchfield, 2 Greenl. 28; Lewiston *v.* North Yarmouth, 5 Greenl. 66.

[3] Moore *v.* Whittaker, 2 Harring. Del. 50. See also Nichols *v.* Stewart, 15 Texas, 226.

invalid because the magistrate or clergyman, who undertook to marry the parties, had no lawful authority to marry them."[1]

§ 658 *a*. **Constitutional, continued.** — It is plain that questions of this kind must depend very much upon the particular terms of the constitution of the State in which they arise. Thus we have seen,[2] that, in Massachusetts, the guilty party after a divorce is not at liberty to contract another marriage, yet jurisdiction is given the court to grant the permission on special application in particular cases. Thereupon it is held, that, if such a party marries without leave of the court, it is not within the legislative power, under the peculiar terms of the constitution of this State, to make the marriage good by special act. Said Chapman, C. J.: "The constitution provides, in part 2, c. 3, art. 5, that 'all causes of marriage, divorce, and alimony, and all appeals from the judges of probate, shall be heard and determined by the governor and council, until the legislature shall by law make other provision.' Other provision was made as to some of these subjects soon after the constitution was adopted; and when the special act of 1869 [confirming the marriage in the case in controversy] was passed all such cases, including petitions for leave to marry again, were, by the general statutes, within the jurisdiction of this court, and this court alone could give him authority to marry again. No jurisdiction in cases of marriage, any more than in cases of divorce, alimony, or appeals from the judges of probate, had been conferred by any law upon the legislature, nor did the constitution give them any power to hear and decide each particular case. They had exercised their power to take away the jurisdiction of the governor and council, and confer it upon another tribunal; and, until the general law by which they had

[1] Gen. Stats. c. 107, § 2; Goshen *v.* Richmond, 4 Allen, 458, 460. See ante, § 95 and note. Under the laws of Texas before her separation from Mexico, marriage was legally constituted only when solemnized by a Catholic priest. But a Texas act in 1841 legalized irregular marriages, which had already taken place, where the parties were living together in the marriage relation. A man was married in an irregular manner to a woman in Texas in 1830. After two years the parties separated, and he married another woman, in the same irregular manner, and lived with her until 1857. It was thereupon held, that the act legalizing irregular marriage made the latter marriage legal from its date, but it had no effect on the first marriage, because the parties separated before it became legal. Rice *v.* Rice, 31 Texas, 174.

[2] Ante, § 307 *a*.

done this should be altered or repealed, their power in such a case as the present was exhausted, as much as in a case of divorce, alimony, or probate appeal."[1] It is perhaps well to say of this case, that, while according to the opinion of the court it depends on the peculiar terms of the Constitution of Massachusetts, the result is evolved from the constitution by a sort of reasoning about which, it is believed, judicial opinions might be expected to differ. To many persons it would seem plain, from the terms of the constitutional provision itself, that the jurisdiction which was originally in the governor and council, and was afterward transferred by statutes to the courts, was the judicial authority, and not the legislative, which still remains in the legislature. Indeed, this has always been the practical construction of the provision; for, after the jurisdiction was given to the courts, the legislative body still continued to legislate on the same subjects, as often as it chose, and the courts have never before challenged the right. True, the acts have ordinarily been general ones, — but is the authority different when the statute is special? And is it a legislative function to confirm a marriage in the circumstances under consideration? In this view, the resolution of the question must depend on other parts of the constitution.

§ 659. **Conclusion.** — The reader will find in the next chapter some discussions which will shed light on the subject of this chapter. But upon principle, under the constitutions of our States generally, there can hardly be doubt of the legislative power to confirm defective marriages, in all cases where the parties in fact consented together to be husband and wife, whatever legal impediment might have existed whereby the consent was prevented from having its desired effect. Yet such confirmation of the marriage would not generally operate to prejudice intervening rights of third persons.

[1] White *v.* White, 105 Mass. 325, 327.

CHAPTER XXXIX.

LEGISLATIVE DIVORCES.

§ 660. **General View — Scope of the Chapter — How divided.** — The subject of legislative divorces is becoming daily of less and less practical interest in the United States, in consequence of the continually increasing jurisdiction given to the courts of the several States to dissolve the matrimonial connection, and of provisions which are rapidly working themselves into our revised constitutions, prohibitive of divorces by the legislature. Still, as the topic is not obsolete, it must receive in these volumes such attention as its intrinsic importance demands. And unfortunately the subject is not one which can be passed over by a mere citation of authorities, or a naked collection of points. In the first edition of this work, prepared at a time when this subject was of much greater practical importance than now, the attention of the reader was called to many illustrative doctrines, sustained by decisions in causes not matrimonial. It is deemed best, in this edition, not to omit the illustrations thus brought forward, yet, on the other hand, not to expand them, or to add any exhaustive citation of the late authorities. The later cases relating directly to the divorce will, of course, be added. The discussion will be divided as follows: I. A General View of the Subject; II. Whether Legislative Divorces impair the Obligation of Contracts; III. Whether they are Retrospective Laws; IV. Whether they are an Exercise of the Judicial Power; V. Some Special Principles and direct Constitutional Inhibitions; VI. How the Divorce is limited in its Effect.

I. *A General View of the Subject.*

§ 661. **How formerly in England — Parliamentary Divorce.** — We shall see, further on,[1] that anciently, in England, judicial divorces for adultery were probably from the bond of matrimony. At least, such is a common opinion, though not universally accepted. But, if this is so, still, in 1601, a contrary rule was in the Court of Star Chamber established, by Whitgift, Archbishop of Canterbury, assisted by other eminent divines and civilians;[2] since which time, if not from an earlier

[1] Post, § 705.

[2] Foljambe's Case, 3 Salk. 138, where the decision is through mistake attributed to Archbishop Bancroft; Sir F. Moore, 683; Noy, 100. See 1 Law Review, 353, 361. In 1869 Dr. Woolsey published an "Essay on Divorce and Divorce Legislation," not strictly a legal work, but one not without interest to the lawyer. At p. 289 he has a note on Foljambe's Case, which, if the author were a lawyer, would be a little remarkable. Dr. Wharton, in his Confl. Laws, § 204, note, adopts what "President Woolsey shows" without apparently giving the subject any thought of his own. I had collected the material for writing a note here correcting a great deal of misapprehension; but, on reflection, I do not deem the matter of sufficient importance to justify occupying space with it, except to make an explanation or two. It is said that the reports of Foljambe's Case by Salkeld and by Moore differ. I do not see that they do in substance and effect, though the form of words is not the same, and Salkeld's is very brief. Salkeld states, not as a part of the report of Foljambe's Case, but of himself, what was the ancient law, and refers to authorities to support the statement. Of course, no lawyer would understand him to be stating on this point a resolution of the court, even if it did not appear, as it does, on the face of what he says, that he was not; for every lawyer knows that courts sit to settle present law, not past. But when we come to what is set down as the resolution of the court, the two reports, including also that in Noy, are alike in substance and real meaning. The substance is, that a second marriage, after a divorce for adultery, was held to be void, — whether it was void or not was the point in issue, and that it was void was the point decided. In the early times of our law, the forms of language as respects the distinction between partial and full divorces, if indeed there was at first any such distinction, were not as well settled as now, and this must be borne in mind when considering the different reports in this case. I am not sure that there was anciently any form of language distinguishing the two kinds of divorce, or any difference in the decree of the court; or that even, going far back in the history of this branch of the law, there was known any divorce which did not dissolve the bond of the marriage. It would rather seem that at the very early period a divorce was a divorce, and it sundered the marriage bond, that gradually the ecclesiastical powers forbade remarriage in this and that case, that next the divorce after which remarriage was not forbidden was termed a divorce *a vinculo*, and lastly the form of decree was altered to conform to the altered law. I have not space properly to discuss this question, and I do not express any opinion upon it. I shall simply quote a passage from Britton, and let the reader digest it for himself. Speaking of the action to recover dower he says: "If several women, all

period, the divorce was uniformly, down to the passing of the new statute, which went into effect in 1858,[1] from bed and board. The Reformation brought with it the doctrine, that the commission of adultery, if not other offences, entitled the injured party to be freed from the vinculum of the marriage. We have seen how the attempt to reform the matrimonial law failed.[2] Hence arose the practice of applying to Parliament for a special act of divorce.

§ 662. **Parliamentary Divorce, continued.** — The first application of this sort, it is said, was by Lord de Roos, in 1669. He procured in the spiritual court a sentence of separation *a mensa et thoro* on the ground of the adultery of Lady de Roos, and then presented his prayer to Parliament to have the marriage dissolved. After much opposition, but with the powerful aid of Bishop Cozens, the divorce was obtained.[3] The next

living at the same time, are united to one man, yet none of them but the first is in law his wife; the others being so in fact and wrongfully. Again, although she was his lawful wife, yet the tenant may say that she ought not to have dower by the rule of law which says that the marriage subsisting action of dower remains, but the marriage failing the action is extinct, and a divorce was pronounced between her and her husband, whereby the marriage ceased, and consequently her action to demand dower is extinguished. *For a divorce* [the reader observes, that the divorce which dissolves the marriage is the thing here spoken of] *is no other thing but a separation of bed between man and wife.* And if this be verified, or not denied, the wife shall not recover any dower." 2 Britton, Nich. ed. top p. 264. It is well known that the third volume of Salkeld, unlike the other two, was a posthumous publication; and, as printed, has its little inaccuracies. I think there is here some inaccuracy in his figures referring to the Year Books; for I do not find in them the place to which the figures point. His references to Bracton and to Glanville appear, on examination, to sustain what he says of the early English law, if I understand the passages correctly; namely, that the effect of a divorce for adultery was to dissolve the bond of the marriage. Thus, Glanville says: "If the wife should, in the lifetime of her husband, be separated from him on account of her incontinence [words the meaning of which will appear when we compare them with the above extract from Britton], the woman shall not be heard upon a claim of dower. The same rule prevails, if she be separated from him on account of relationship [a case in which the divorce, all admit, dissolved the bond of marriage], she shall be debarred from claiming her dower." Beames Translation, p. 133. Other old books contain testimony of the like sort. To say, therefore, that various writers have been "misled" by Salkeld, whose report of Foljambe's Case they have accepted as correct when it is not, is simply absurd. But whatever may be the truth on the point, it has no other interest than historical, consequently I drop the discussion.

[1] Ante, § 65.

[2] Ante, § 30.

[3] Hosack Confl. Laws, 255; Macqueen H. L. Pract. 471, 551. On the latter page is a report of Lord Roos's Case, and the bishop's argument. In form, the bill of divorce merely granted

two parliamentary divorces occurred just before the close of the same century, on similar grounds, on the applications of the Duke of Norfolk and of the Earl of Macclesfield respectively; and these three cases appear to have established the legislative practice for succeeding ones.[1] The remedy was given, almost as of course, to the husband, whenever he applied; but not to the wife, except under special circumstances. Of the causes of parliamentary divorce, Macqueen says: "On a retrospect of one hundred and seventy years, since the establishment of the system of parliamentary divorce *a vinculo*, I find no case in which that remedy has been awarded or sought, without a charge of adultery. There is no example of a bill of divorce for malicious desertion; although, in the other Protestant countries of Europe, that offence, properly established, is considered a scriptural ground of divorce *a vinculo matrimonii*. . . . . It is not undeserving of attention that the argument of Bishop Cozens in Lord Roos's Case was not limited to adultery, but included within its range this crime of malicious desertion, by which, as well as by adultery, he appears to have contended that the nuptial bond was rescinded. . . . . What might be the result of such an application, strongly supported by evidence of wilful and long-continued desertion and abandonment, must be matter of conjecture, or, at best, of very doubtful speculation; the discretion of Parliament being unfettered by precedents, and open to a free consideration of the special circumstances of every new case."[2] If the reader compares this with the present divorce law in England,[3] he will see that parliamentary divorces must now be practically abolished.

§ 663. **Right of Legislative Divorce as Common Law with us — American Practice.** — From England was imported into most of our States the practice, which prevailed more in earlier times than now, of granting legislative divorces in meritorious

liberty to marry again; whence it has been inferred, that the ecclesiastical divorce was deemed a dissolution of the marriage, and the act of Parliament was resorted to merely to get rid of the bond required by the ecclesiastical court that the applicant for the divorce would not enter into a second marriage. 1 Law Review, 362, 363.

[1] Hosack ut supra; Macqueen H. L. Pract. 473.

[2] Macqueen H. L. Pract. 473, 474.

[3] Ante, § 65, note.

cases not reached by the general law. In some instances, indeed, though rarely, the legislatures have seemed to exercise a sort of concurrent jurisdiction with the courts. These special divorces are usually from the bond of matrimony, sometimes from bed and board,[1] and sometimes they are in the nature of a sentence of nullity. Generally the English practice is adopted, of passing, though with less accompanying formality than formerly in England, an act operating directly on the marriage; but occasionally the method has been to empower one of the judicial tribunals to investigate the cause alleged, and grant the divorce if the complaint is sustained. This, indeed, is the practice always resorted to in some of the States.[2]

§ 664. **Continued — General Doctrine.** — The right of the English Parliament to dissolve marriages in this way is entirely clear; and from this the argument becomes strong, that the same legislative right exists also in the United States. It is conclusive of every question except the great one; namely, whether the authority is not restrained, in this country, by constitutional provisions. As legislative divorces are coming into disrepute,[3] and judicial ones are more favored, the people of a considerable number of the States have utterly forbidden the former by express clauses in recent revisions of their constitutions.[4] In such States, a legislative divorce would, of course, be a mere nullity. But when there is no express inhibition, the doubt is still sometimes agitated, whether the legislature is not, in effect, debarred by the Constitution either of the United States or of the particular State. This question may present itself somewhat differently in different States; but, after allowing for the differences, the authorities are in such irreconcilable conflict that any attempt to harmonize them would be fruitless. Nor is this surprising; for some of the points involved are really attended with great intrinsic difficulty. We shall examine them in their order; and the conclusion to which the examination will conduct us is, that, as a general proposi-

[1] See Young *v.* Naylor, 1 Hill Eq. 383; ante, § 26, note.

[2] Berthelemy *v.* Johnston, 3 B. Monr. 90; Levins *v.* Sleator, 2 Greene, Iowa, 604.

[3] 1 U. S. Mo. Law Mag. 187.

[4] See Head *v.* Head, 2 Kelly, 191; Teft *v.* Teft, 3 Mich. 67.

tion, the several legislatures may, in the absence of an express constitutional inhibition, dissolve by special act the marriage, yet may not include in the act any collateral matter affecting property rights, such as a direction for the payment of alimony.

II. *Whether Legislative Divorces impair the Obligation of Contracts.*

§ 665. **The Constitutional Provision — What Results.** — It has been suggested, but not much urged, that legislative divorces are an infringement of the provision of the Constitution of the United States, that "no State shall . . . . pass any . . . . *law impairing the obligation of contracts.*"[1] In the Dartmouth College Case, Mr. Justice Story made use of language, *arguendo*,[2] which has been construed into such an intimation; but, if by any rules of interpretation this idea can be drawn from his words, by the same rules his later and more mature opinion is shown to have been the other way.[3]

§ 666. **What Results, continued.** — The Supreme Court of Florida, however, appears to have taken this view. After stating another ground on which the decision equally rested, Semmes, J., who delivered the opinion in the case, proceeded as follows: "I know no reason why the word 'contract,' as used in the Constitution, should be restricted to those of a pecuniary nature; and not embrace that of marriage, involving, as it does, considerations of the most interesting character, and vital importance to society, to government, and the contracting parties. It is comprehended by the words of the Constitution, and there is no rule of construction that would exclude it, in the absence of any thing to show that it is not within its spirit. And what are the *obligations* of the contract, but the rights and duties which grow out of it? A legislative act which discharges the duties and destroys the rights acquired, under any contract, must of necessity impair its obligation. A law affecting the remedy does not impair its obligation; but an act of the legislature dissolving the contract *destroys* the obligation."[4] And in a case of a somewhat earlier date, one of the

[1] U. S. Const. art. 1, § 10, cl. 1.

[2] Dartmouth College *v.* Woodward, 4 Wheat. 518, 695.

[3] Story Confl. Laws, § 108, note, and § 200.

[4] Ponder *v.* Graham, 4 Fla. 23.

judges of the Supreme Court of Missouri delivered an argument to substantially the same effect.[1]

§ 667. **Continued.** — But this provision of the Federal Constitution is not generally supposed to have any sort of reference to marriage. The doctrine which has been sufficiently discussed in the earlier parts of this volume, according to which marriage is not a contract but a status,[2] settles, if it be received, the question now under consideration. When the contract to become husband and wife is executed by the parties becoming such, then the status assumed stands before the law a thing of legal institution, to be regulated, from time to time, as the public good may direct. There is no contract in the way of such regulation. And in a late opinion of the Supreme Court of the United States, it was observed by Daniel, J., that the contracts designed to be protected by this provision of the Constitution are those "by which *perfect rights, certain definite, fixed, private rights of property are vested.*"[3] If marriage were a contract within this provision of the Constitution, the consequence would seem to follow, that nothing could ever be made a ground of divorce which was not such ground when the particular marriage was entered into, — contrary to the universal doctrine, concerning which there is no dispute.[4]

§ 668. **Continued.** — In respect to the last point it has indeed been said, that "regulations intended to enforce the obligations of the contract in future impair no vested rights. The contract of marriage, it is well understood, is subject to them, and all persons may avoid their operation by an adherence to the duties imposed by the contract itself."[5] But the answer to this reasoning, which is correct if marriage be viewed as a status or institution of society, is, that if viewed as a con-

[1] McGirk, J., in The State *v.* Fry, 4 Misso. 120, 184.

[2] Ante, § 3 et seq.

[3] Butler *v.* Pennsylvania, 20 How. U. S. 402, 416, 3 Am. Law Jour. 385. See also Stanley *v.* Stanley, 26 Maine, 191; Phalen *v.* Virginia, 8 How. U. S. 163, 168; Cochran *v.* Van Surlay, 20 Wend. 365; People *v.* The Auditor, 1 Scam. 537. It has been held, that a statute releasing husbands from liability to pay the antenuptial debts of their wives, may be constitutionally applied to marriages which were entered into before the enactment of the statute. Fultz *v.* Fox, 9 B. Monr. 499.

[4] And see Carson *v.* Carson, 40 Missis. 349; Starr *v.* Hamilton, Deady, 268; Askew *v.* Durpee, 30 Ga. 173.

[5] Clark *v.* Clark, 10 N. H. 380, 391.

tract of like character with other contracts, it is no violation of *the agreement entered into* to do a thing not then legally prohibited; and to create a new duty and attach a new penalty is to infringe rights which have accrued under the agreement.[1] To this extent, indeed, the reasoning of McGirk, J., in Missouri, seemed to point. "In the case before the court," he said, "I think it has been shown that by this marriage the wife contracted and gave to the husband her person and fortune, subject to the action of the law of the land *as it then stood*. It is a fixed rule in law, that the law relating to a contract is as much a part of the agreement as if it were expressed by the parties."[2] And in the language of Story, "imposing *conditions not expressed in the contract*, ... however minute or apparently immaterial in their effect upon it, impairs its obligation."[3] It is therefore well established, that State insolvent laws, which undertake to discharge, even between citizens of the State, the obligation of contracts made antecedently to their passage, are in violation of this constitutional provision.[4] But the whole course of judicial decision has been to consider all divorce laws as being properly applicable to marriages contracted previously to their enactment.[5] Even in those cases where it has been held that they cannot include antecedent causes of divorce, it has been conceded they can antecedent marriages.[6]

§ 669. **Continued.** — It is not strange, therefore, that courts are not ready to yield to a doctrine which in its consequences would overturn established principles, work immense domestic distress, and bastardize multitudes of children. And it is clearly held, and is in spite of the contrary opinions we have alluded to,[7] the settled law, that legislative divorces are not invalid as impairing the obligation of contracts, within the meaning of the Constitution of the United States, whatever other objections may be urged against them.[8]

[1] See Gains *v.* Buford, 1 Dana, 481, 484; Violett *v.* Violett, 2 Dana, 323, 326.

[2] The State *v.* Fry, 4 Misso. 120, 184, 185; s. p. Bryson *v.* Campbell, 12 Misso. 498.

[3] Story Const. § 1379.

[4] Story Const. § 1381, 1384.

[5] Carson *v.* Carson, 40 Missis. 349.

[6] Clark *v.* Clark, 10 N. H. 380; ante, § 98 et seq.

[7] Ante, § 666.

[8] Opinion of the Supreme Judicial Court of Maine, 16 Maine, 481; Starr *v.* Pease, 8 Conn. 541; Berthelemy *v.* Johnson, 3 B. Monr. 90; Hull *v.* Hull,

III. *Whether Legislative Divorces are Retrospective Laws.*

§ 670. **How as to such Laws in General.** — Many of the State constitutions contain a clause forbidding the *legislature to pass any retrospective laws.* And where there is no such express clause, they are generally held to be void as opposed to the principles of right inherent in the social compact.[1] But where it is just and proper that they be passed, they are valid, unless expressly in contravention of the constitution.[2] And the question has been agitated, and variously decided, whether a legislative divorce is a retrospective act within either the general principle or the constitutional inhibition.

§ 671. **Continued.** — Before we enter upon the direct consideration of this topic, it will be necessary to take a view of some of the principles which, in other causes than divorce, have guided the courts in determining whether a particular statute is retrospective or not. Said Richardson, C. J., in a New Hampshire case: "A retrospective law, for the decision of civil causes, is a law prescribing the rules by which existing causes are to be decided upon facts existing previous to the making of the law. Indeed, instead of being rules for the decision of future causes, as all laws are in their very essence, retrospective laws for the decision of civil causes are, in their nature, judicial determinations of the rules by which existing causes shall be settled upon existing facts. They may relate to the grounds of the action, or the grounds of the defence."[3] And it was observed by Judge Story, that, "upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be

2 Strob. Eq. 174; Bingham *v.* Miller, 17 Ohio, 445, 447; Levins *v.* Sleator, 2 Greene, Iowa, 604; Cabell *v.* Cabell, 1 Met. Ky. 319; Starr *v.* Hamilton, Deady, 268; Adams *v.* Palmer, 51 Maine, 480.

[1] University *v.* Williams, 9 Gill & J. 365; Ward *v.* Barnard, 1 Aikens, 121; Lyman *v.* Mower, 2 Vt. 517; Kendall *v.* Dodge, 3 Vt. 360; Merrill *v.* Sherburne, 1 N. H. 199, 213; Ham *v.* McClaws, 1 Bay, 93; Story Const. § 1399; Bishop First Book, § 88–91. But see Beach *v.* Woodhull, Pet. C. C. 2.

[2] Goshen *v.* Stonington, 4 Conn. 209.

[3] Woart *v.* Winnick, 3 N. H. 473, 477.

deemed retrospective, and this doctrine seems fully supported by authorities." [1]

§ 672. **Continued.** — But in order to render an act retrospective within the prohibitory provision we are considering, it must undertake to "impair," in the language of Woodbury, J., "rights which are *vested*. Most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State produces amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give may always revoke before an interest is perfected in the donee. Thus the right to prosecute actions in a particular time or manner may perhaps be modified or taken away at any period before the actions are commenced.[2] So also may the right of *femes covert* to dower, at any period before the death of their husbands; and so the right of the next of kin to a relation's estate, at any period before the relation's death." [3]

§ 673. **Continued.** — And in the Supreme Court of Tennessee, there being a provision in the State constitution "that no retrospective law, or law impairing the obligation of contracts, shall be made," Hayward, J., thus discourses: "Does it mean all retrospective laws in general, or only some particular description, and, if the latter, of what description? Not retrospective laws in general; for then no law could be made for the remuneration of past services, not even the members of assembly, their clerks, and door-keepers, at the end of each session of assembly. Nor could further time be given for the probate and registration of deeds; of which there never was any doubt, from the first assembly after the formation of the constitution to this day. Such probates and registrations have been sanctioned in a thousand instances by our courts of justice. Nor can it mean, laws made for the preservation and establishment of just rights and titles which have become imperfect and infirm by the non-observance of some legal cere-

[1] Society *v.* Wheeler, 2 Gallis. 105, 139; s. p. Officer *v.* Young, 5 Yerg. 320.

[2] Whitman *v.* Hapgood, 10 Mass. 437, 439.

[3] Merrill *v.* Sherburne, 1 N. H. 199, 214.

mony; for these laws are not to take away rights, but to confirm and establish them.

§ 674. **Continued.** — "Laws," continued the learned judge, "for providing easier modes for proving deeds; for rewarding past services; for amending mistakes in grants and deeds; for giving verdicts in evidence, instead of judgments; for legalizing marriages made under the Frankland government, administrations under the same government, and judgments and sales under its authority; and acts of limitation, suspended during the time a war lasted, — in such instances the law is retrospective, but not unconstitutional, because not such retrospective law as this article of the constitution prohibits. There are some retrospective laws which it does prohibit; *ex post facto* laws, for instance, and laws impairing the obligation of contracts; these are justly prohibited, because they destroy existing rights, not preserve them from destruction. If there be any other such laws, which the constitution prohibits, time and future emergencies will bring them to light; but to say in general, all retrospective laws are void, is to introduce at one breath all the disorders which have been supposed by the acts before mentioned, and by many others which are not at present particularly remembered; and to wrest from the legislature a power which has been hitherto exercised to the great benefit of the community, and for which, in various instances, complete and perfect justice could not be procured without the use of such laws, — is what the court, in my judgment, have not the right and should not have the wish to do. Whenever a legal right did once exist, and is likely to be lost by some accident, omission, or imperfection, an act of the legislature may be interposed to prevent the loss, and to give stability to the right. In such case, no one is deprived of his property; but, on the contrary, loss of property is obviated, and just and equitable rights, which conscience sanctions, are preserved." [1]

§ 675. **Continued.** — In further illustration of the principle, that, within this constitutional inhibition, a law is retrospective or not, according as the rights it assumes to take away are vested or otherwise, — we may observe, that, while the legis-

[1] Bell *v.* Perkins, Peck, 261, 266, 267. See also Stanley *v.* Stanley, 62 Maine, 191.

lature can change a statutory period of limitation in respect to causes of action existing and not already barred by lapse of time, or in respect to a lien on an existing judgment;[1] yet, if the statute has fully run and the lien is extinguished, or, if the right of action is barred, the extinct right cannot be revived by subsequent legislation.[2] So, as marriage does not absolutely vest in the husband the wife's choses in action, but only gives him a qualified title to them, dependent upon his reducing them during the coverture to possession; a statute may, before such reduction, intervene and hold them to her sole and separate use; and he will then have no right to the property on its coming actually into her hands.[3] But if it has already vested in him, by a reduction to possession; or, if he has a vested remainder in her property, of which he has not become actually possessed, — his right cannot be taken away by legislation.[4] So the legislature may make any special or general law regulating the proceedings in courts for the enforcement of causes of action which have already accrued; but, after a party has obtained judgment, it cannot authorize a new trial or an appeal.[5]

§ 676. **Continued.** — Thus it is seen that our legislatures may materially affect the rights of citizens, without infringing upon the constitutional provision against retrospective enactments. "They may so change the law of descents as to cut off all our expectations of inheritance, and confer it upon a single child; and may deny the power of disposition by will, so as to prevent the bounty of our parents. They may so change the rules of evidence as to make it difficult to establish our rights. They may so limit the time of suit, as, when elapsed, to deny us all remedy to enforce those rights; and

[1] Miller *v.* Commonwealth, 5 Watts & S. 488.

[2] Woart *v.* Winnick, 3 N. H. 473; Holden *v.* James, 11 Mass. 396; Bradford *v.* Brooks, 2 Aikens, 284.

[3] Clarke *v.* McCreary, 12 Sm. & M. 347; Price *v.* Sessions, 3 How. U. S. 624. But see Holmes *v.* Holmes, 4 Barb. 295; White *v.* White, 5 Barb. 474. And see ante, § 667, note.

[4] Jackson *v.* Sublett, 10 B. Monr. 467.

[5] Such acts are void, not only because they are retrospective, but because they are an exercise of judicial power. Lewis *v.* Webb, 3 Greenl. 326; Durham *v.* Lewiston, 4 Greenl. 140; Bates *v.* Kimball, 2 D. Chip. 77; Staniford *v.* Barry, 1 Aikens, 314; Merrill *v.* Sherburne, 1 N. H. 199. But see Calder *v.* Bull, 3 Dall. 386, which has been thought, however, not to be inconsistent with the foregoing authorities. Smith Stat. and Consist. Law, § 365.

yet, in all these cases and the like, not violate that great fundamental law." [1]

§ 677. **Continued — Waiving the Right.** — So this constitutional objection is one which the parties in interest may waive; [2] and, if they do waive it, the act, passed therefore with their consent, either express or implied, will be good, even though otherwise it would have been invalid. Thus it is that "all public officers impliedly consent to alterations in the institutions in which they officiate, provided the public deem it expedient to introduce a change." [3] So that a law creating an office may be repealed before the term of an incumbent has expired, and the repeal determines both the office and the compensation.[4] For the same reason the State may pass a retrospective act impairing its own rights.[5] And a person not interested in the right cannot object that the law is unconstitutional, as being retrospective.[6]

§ 678. **The Doctrine applied to Legislative Divorces.** — Whatever view, therefore, we take of marriage, even though we deem it to be in all respects a contract, the legislature is clearly competent to divorce parties with their consent.[7] So it would seem that the consent, instead of being express, may be implied; as by the divorced person ceasing to make any claim to the rights which depend on the marriage, after he is informed of the divorce. Nor could any third person take the objection,[8] that the act was passed without the concurrence of the parties. And, said a learned judge in delivering, in a case where no consent was shown, the most elaborate opinion against legislative divorces to be found in the books: "I see no reason why this act will not operate, as it declares it shall act, so as to free the parties from the pains and penalties of a second marriage. I see no reason why the legislature may not make the children of the second marriage capable of inheriting to

[1] Edwards *v.* Pope, 3 Scam. 465, 469.

[2] See Dula *v.* The State, 8 Yerg. 511; Cabell *v.* Cabell, 1 Met. Ky. 319; 1 Bishop Crim. Law, § 657.

[3] Woodbury, J., in Merrill *v.* Sherburne, 1 N. H. 199, 213.

[4] People *v.* The Auditor, 1 Scam. 537; Butler *v.* Pennsylvania, 10 How. U. S. 402.

[5] Davis *v.* Dawes, 4 Watts & S. 401.

[6] Sinclair *v.* Jackson, 8 Cow. 543; Coleman *v.* Carr, Walk. Missis. 258.

[7] See Berthelemy *v.* Johnson, 3 B. Monr. 90.

[8] Ante, § 677.

whomsoever they choose, in case of intestacy."[1] In short, the legislature may clearly, and even without the consent of the parties, enact, that they shall no more be known as husband and wife; that each may take a new matrimonial partner; that they shall cohabit no more under the former marriage; or, if they do, that they shall be punished as for adultery and the issue be illegitimate; and that the issue of the second marriage shall be legitimate. Nothing of this would be a divesting of vested rights, but it would be furnishing rules for future conduct; and what would remain of the vinculum of the marriage would not be worth contending for.[2] If a legislature should pass such an act wantonly, and without any reason but a wish to injure a citizen; or, if it should undertake to overturn all marriages by one general statute; another question might arise, not whether the act was retrospective as divesting vested rights, but whether it was not a violation of the good faith implied in the organization of every constitutional government. We conclude, therefore, that a special act dissolving a marriage is not a retrospective law; and this is the view best sustained by authority.[3]

[1] McGirk, J., in The State *v.* Fry, 4 Misso. 120, 193. A legislature may even alter the status of legitimacy; but this will not divest rights of property already vested. Norman *v.* Heist, 5 Watts & S. 171.

[2] See Opinion of the Supreme Judicial Court, 16 Maine, 479, 481.

[3] Starr *v.* Pease, 8 Conn. 541; Townsend *v.* Griffin, 4 Harring. Del. 440; Holmes *v.* Holmes, 4 Barb. 295; Maguire *v.* Maguire, 7 Dana, 181; Hull *v.* Hull, 2 Strob. Eq. 174; West *v.* West, 2 Mass. 223; Cabell *v.* Cabell, 1 Met. Ky. 319. The case of The State *v.* Fry, 4 Misso. 120, affirmed in Bryson *v.* Campbell, 12 Misso. 498, which appears to be very strong against the legislative power of divorce, does in fact only decide, that the husband, who has not consented to the act, is not by it barred from recovering the wife's choses in action. This doctrine, assuming the marriage to be dissolved, is indeed contrary to the general course of authority, which considers the choses in action dependent on the coverture, and the husband's right to receive them as ceasing with it. And see the observations of Marshall, C. J., upon this case, in Gaines *v.* Gaines, 9 B. Monr. 295. It may be observed, that the decision in The State *v.* Fry, appears to have produced little effect at home, or else to have been there regarded as settling nothing as to the vinculum of the marriage; for the legislature, at its next session, granted *fifty-five* special divorce bills. Page on Div. 58, note. In a later Missouri case, the legislative power to undo the vinculum was directly in issue, and the court most distinctly denied the existence of it. Bryson *v.* Bryson, 17 Misso. 590. In a still later case, the majority of the Missouri court held, on the strength of these decisions, that the former territorial legislature did not possess the power of divorce. Chouteau *v.* Magenis, 28 Misso. 187. In Berthelemy *v.* Johnson, 3 B. Monr.

§ 679. **Continued.** — Another very clear, and, it would seem, just view of this question has been taken. It is, that marriage is an institution in which the public is interested; and that the legislature must, therefore, always retain control over it. Vested rights of private property may be transferred from one individual to another, for the public good; though, in this instance, not without compensation.[1] So, for the same reason, a marriage, even regarding it as a vested right, may be dissolved when the dissolution of it will be for the public good.[2] And the question of compensation could not arise. Still the true view is undoubtedly to consider that the constitutional inhibition of retrospective laws, like the one concerning the obligation of contracts, has nothing whatever to do with questions of status.

IV. *Whether Legislative Divorces are an Exercise of Judicial Power.*

§ 680. **General Views.** — It has been sometimes urged, that legislative divorces are an *infringement upon the rights of the judiciary*. There is nothing in the Constitution of the United States which restrains the legislatures of the States from the exercise of judicial powers.[3] But in several of the State constitutions there are express prohibitions; and, in all, "the legislative, judicial, and executive functions are vested in different functionaries; and it would seem to follow that the powers thus specially given should be exercised under their appropriate limitations."[4] And the question has been considerably agitated, whether the granting of divorces is not a judicial act, which can only be performed by the judiciary. Chancellor Kent has said: "The question of divorce involves investigations which are properly of a judicial nature, and the jurisdiction over divorces ought to be confined exclusively to the judi-

90, it is left undecided, "whether the legislature could constitutionally dissolve the marriage without the consent of both parties to it, and without any breach of the contract."

[1] Beekman *v.* Saratoga and Shenectady Railroad, 3 Paige, 45.

[2] Maguire *v.* Maguire, 7 Dana, 181; Townsend *v.* Griffin, 4 Harring. Del. 440; Holmes *v.* Holmes, 4 Barb. 295, 301.

[3] Satterlee *v.* Matthewson, 2 Pet. 413.

[4] McLean, J., in Watkins *v.* Holman, 16 Pet. 25, 60. And see the observations of Harrington, J., in Townsend *v.* Griffin, 4 Harring. Del. 440.

cial tribunals, under the limitations to be prescribed by law."[1] But this learned person has nowhere expressed the opinion, that a divorce may not be valid as an exercise of legislative power. What therefore is a legislative, and what a judicial function within the meaning of this constitutional inhibition? And is the dissolution of marriage the one, or the other, or both?

§ 681. **Legislative and Judicial Functions distinguished — How as to Divorce.** — "In some cases," observes McLean, J., "it is difficult to draw the line that shall show with precision the limitation of powers, under our form of government. The executive, in acting upon claims for services rendered, may be said to exercise, if not in form, in substance, a judicial power. And so a court, in the use of a discretion essential to its existence, by the adoption of rules or otherwise, may be said to legislate. A legislature, too, in providing for the payment of a claim, exercises a power in its nature judicial; but this is coupled with the paramount and remedial power."[2] And there are functions which may be employed at pleasure either by the courts or the legislature. Thus it is evident that the same rules of procedure which the judicial tribunals are competent to make for themselves, may be made, instead, by the legislature.[3] Thus, too, the legislature may license the sale of the real estate of minors, notwithstanding it has delegated the same authority to the courts.[4] Therefore, upon principle, there would seem to be no reason why the granting of a divorce should not be either a legislative or a judicial act, — legislative, when it is performed as a mere exercise of sound discretion for the good of the parties and of the public, in which case vested rights could not be divested, but only the parties' social relation, or status, for the future ascertained and established; judicial, when it is demanded as a right, under established laws, in consequence of some breach of duty committed by the offending party.

§ 682. **Continued — Divorce Either.** — But, to continue the inquiry as to the distinction between a legislative and judicial

[1] 2 Kent Com. 106.

[2] Watkins *v.* Holman, 16 Pet. 25, 60. See also Miner's Bank *v.* United States, 1 Greene, Iowa, 553.

[3] See ante, § 78–86.

[4] Rice *v.* Parkman, 16 Mass. 326; Watkins *v.* Holman, supra. See also Cochran *v.* Van Surlay, 20 Wend. 365.

function, in a New Hampshire case, Woodbury, J., observed: "A marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct; the latter make rules, upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore, to compare the claims of parties with the laws of the land before established, is in its nature a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is in its nature a legislative act; and, if these rules interfere with the past or the present, and do not look wholly to the future, they violate the definition of a law, as a rule of civil conduct; because no rule of conduct can, with consistency, operate upon what occurred before the rule itself was promulgated."[1] Perhaps, therefore, if we were to attempt a definition, it would be, that a judicial act is the determination of the rights of parties, by the application of those rules of law which the court finds to be in actual existence, to facts which are either admitted or proved; while a legislative is the establishment of a new rule for the future. This new rule may be made applicable either to one or more particular individuals alone, in which case it is termed a special act; or to the entire community, when it is denominated a general statute.[2] And here again we may observe, that, if this distinction be adopted, the granting of a divorce, so far as it operates to change the status of the parties, may be either legislative or judicial.

§ 683. **Divorce Statute Special.** — The fact that the statute is special, instead of general, cannot alter the question; for

[1] Merrill *v.* Sherburne, 1 N. H. 199; s. p. Jones *v.* Perry, 10 Yerg. 59, 69.

[2] The distinction is thus stated by Smith: "If an act of the legislature in terms judicially determines a question of right or of property, as the basis upon which the act is founded, so far the act must be regarded as a judicial act, and repugnant to the constitution. But if the act simply authorizes the doing of an act with the view of attaining a given end, or accomplishing a particular result, without any determination of the fact of the existence of that which secures to a party a right to the fruits of the act; such an act is not liable to this constitutional objection." Smith Stat. & Const. Law, § 347. Again: "Where a legislative act does not in any manner determine any matter of fact or of right dependent upon matters of fact, such an act is not liable to the objection, that it is the exercise of judicial powers." Ib. § 351.

the number of persons upon whom it is to operate is immaterial.[1]

§ 684. **Distinction how, in Maine — Iowa.** — The judges of Maine have taken of this subject a view which is somewhat novel. It is substantially, that, the source of all power being in the legislature as the representative of the people, every function is legislative until made judicial by legislative enactment. But when legislation has vested a jurisdiction in the courts, then all matters committed to them become judicial, and they cannot be concurrently acted upon by the legislature. There is no other mode, it was said, of ascertaining what subjects do properly belong to the legislative, and what to the judicial department. "Men's judgments may greatly differ respecting what questions are, in their own nature, essentially judicial. One of the principal objects of the provision for the division of power, doubtless, was to avoid the danger and mischief of a conflicting exercise of power upon the same subject. By the proposed construction this can never take place between the legislative and judicial powers, in those cases over which the judicial power by law has no jurisdiction, although they may be apparently proper for judicial decision. To declare that all questions apparently more fit for the exercise of judicial than legislative power were included within the judicial power, would be, therefore, to extend that power by construction beyond what is necessary to avoid the mischiefs to be apprehended from a conflict of power. And it would leave the judicial power so vague and undefined as to afford frequent occasion for those very conflicts and mischiefs which it was the intention to avoid. It may be objected to this construction, that it would permit the legislature, by refusing to pass any law giving to the judicial power cognizance of any class of contracts or questions, to usurp the whole judicial power, and to decide upon all contracts and questions arising between party and party. It is not to be presumed that it would refuse to perform its duty, and so violate the Constitution as to annihilate, for all practical purposes, one

[1] Edwards *v.* Pope, 3 Scam. 465, 469; Watkins *v.* Holman, 16 Pet. 25, 69; Norman *v.* Heist, 5 Watts & S. 171; Commonwealth *v.* Worcester, 3 Pick. 462, 473.

department of the government. And if it could be supposed to do so, it could not itself exercise the power thus improperly withheld, in all that class of cases which are required by the Constitution to be tried by jury." In applying this principle to the question of divorce, the judges were of opinion, that, until the legislature enacts laws upon the subject, and invests the courts with jurisdiction, it can itself exercise the authority at pleasure; but it cannot interfere in respect to those causes which it has intrusted to the judiciary; else there would be practically an appeal from the highest judicial tribunal. Yet, for causes not embraced in the general laws, the legislature may lawfully grant divorces.[1] The same view substantially was also taken in a very late case, by the court in Iowa. And it was said, that the burden of proof lies with the party calling in question the legislative divorce, to show, that it was for a cause within the authority of the courts.[2]

§ 685. **Further of the Distinction and its Effect.** — Lexicographers consult usage to determine the signification of words. And so, as a doctrine of statutory interpretation, the words of a new enactment are to have the meaning they bore in the old law.[3] On this principle, a judicial power, in the language of the constitution of a State, may well be regarded as one which had previously been exercised by the judicial tribunals; and a legislative, one which had been employed by the legislature. Now, in England, the country whence we derive our laws, no judicial dissolutions of valid marriage have been known till of late; but all were by special legislative act. And divorce acts have been frequent, from early times, in almost all our colonies and States. When, therefore, our constitutions were adopted, the granting of divorces was practically a legislative function. And we may conclude, that, if in any case the people had intended to restrain this practice, they would have so specified; and that an inhibition of judicial powers should not be construed to embrace a function

[1] Opinion of the Supreme Judicial Court, 16 Maine, 479, 483, 484, 485; Adams *v.* Palmer, 51 Maine, 480. See post, § 692*a*. See also the observations of Harrington, J., in Townsend *v.* Griffin, 4 Harring. Del. 440. See post, § 689.

[2] Levins *v.* Sleator, 2 Greene, Iowa, 604.

[3] Bishop Stat. Crimes, § 97–101.

which had theretofore been exercised by the legislature.[1] In aid of this view is the fact, that, in most of the States, the same legislative practice has prevailed since the adoption of their constitutions as before; and thus we have, not only a sort of contemporaneous construction, but scope for the further consideration, that, since the power has been used for many years, it should be deemed, almost conclusively, to have been rightly employed. The judgment and usage of ages are an authority not lightly to be disregarded.[2]

§ 686. **The Result.** — But whatever be the course of argument adopted, the general result is, that the granting of divorces by the legislature is not such an exercise of judicial authority as will render them invalid.[3] In Missouri, where a contrary doctrine is held, the provision of the constitution is in very peculiar language. It is: "The powers of the government shall be divided into three distinct apartments, each of which shall be confined to a separate magistracy, and no person charged with the exercise of powers properly belonging to one of those departments shall exercise any power properly belonging to either of the others, except in the instances hereafter expressly directed or permitted."[4] Whether, however, this peculiarity of language did or should make any difference in the result, is perhaps doubtful.[5] In Ohio, too, whose Supreme Court expressed the opinion, that the granting of divorces is a judicial act, not within the authority of the legislature; but still pronounced such a divorce valid, because of the mischiefs which would ensue from a contrary decision; there appears to have been a peculiarity of another sort in the constitution. The court said: "The legislature

[1] Crane *v.* Meginnis, 1 Gill & J. 463. And see Jamison *v.* Jamison, 4 Md. Ch. 289, 297.

[2] The State *v.* Mayhew, 2 Gill, 487; Calder *v.* Bull, 3 Dal. 386.

[3] Starr *v.* Pease, 8 Conn. 541; Crane *v.* Meginnis, 1 Gill & J. 463; Maguire *v.* Maguire, 7 Dana, 181; Hull *v.* Hull, 2 Strob. Eq. 174; West *v.* West, 2 Mass. 223; Townsend *v.* Griffin, 4 Harring. Del. 440; Holmes *v.* Holmes, 4 Barb. 295, 301; Levins *v.* Sleator, 2 Greene, Iowa, 604; Jones *v.* Jones, 1 U. S. Mo. Law Mag. 300, 2 Jones, Pa. 350; Cabell *v.* Cabell, 1 Met. Ky. 319. But see Ponder *v.* Graham, 4 Fla. 23; Wright *v.* Wright, 2 Md. 429. And see 3 American Jurist, 180.

[4] The State *v.* Fry, 4 Misso. 120; Bryson *v.* Bryson, 17 Misso. 590. And see ante, § 679, note. Richeson *v.* Simmons, 47 Misso. 20; post, § 695 *a*.

[5] And see Chouteau *v.* Magenis, 28 Misso. 187, stated ante, § 679, note.

is not sovereign; nor are all the departments of government combined. The people only are sovereign. Nor can the matter be helped out by implication; for the constitution in express terms declares, that 'all powers not hereby delegated remain with the people.' The legislature, then, as well as the other departments of State, possesses only a delegated power, and can exercise no power not delegated. The constitution confers no power to grant divorces." [1] In respect to this view it is obvious, however, that the Constitution of Ohio must have authorized the legislature to make laws, special as well as general; and a divorce act is merely a special law.

V. *Special Principles and direct Constitutional Inhibitions.*

§ 687. **Express Prohibition — Fraud on the Legislature — Jurisdiction in the Courts.** — Having, therefore, on a view of the various branches of this subject, arrived at the conclusion, that, as a general proposition, the legislatures of the several States have power to grant divorces by special act, let us look at some of the limitations which have been proposed to this doctrine. In the first place, such divorces cannot be awarded in those States where they are expressly prohibited by the constitution.[2] In the next place, perhaps a legislative divorce may, like any other, be void for fraud; [3] though this point appears to have been decided in a recent case the other way.[4] In the third place, we have already stated the doctrine of Maine and Iowa, that these divorces are not allowable for causes over which the courts have jurisdiction.[5] A position similar to that last named appears also to have been maintained by the tribunals of one or two other States; [6] but the question has there been blended with others, which we shall presently consider.[7]

§ 688. **Massachusetts.** — The Constitution of Massachusetts, which was adopted in 1780, provided, that "all causes of mar-

[1] Bingham *v.* Miller, 17 Ohio, 445.

[2] Ante, § 660, 664.

[3] See Charles River Bridge *v.* Warren Bridge, 7 Pick. 344; Sunbury and Erie Railroad *v.* Cooper, 9 Casey, 278.

[4] Post, § 690–692. See Bishop Stat. Crimes, § 38.

[5] Ante, § 684.

[6] Jones *v.* Jones, 2 Jones, Pa. 350, 7 Legal Intelligencer, 19, 1 U. S. Mo. Law Mag. 300; Gaines *v.* Gaines, 9 B. Monr. 295; Townsend *v.* Griffin, 4 Harring. Del. 440; Crane *v.* Meginnis, 1 Gill & J. 463.

[7] Post, § 690–692.

riage, divorce, and alimony . . . . shall be heard and determined by the Governor and Council, until the legislature shall, by law, make other provision."[1] And in 1792, a special resolve granting a divorce to parties therein named, having passed both houses of the legislature (the general jurisdiction in divorce causes having been previously transferred by legislation from the Governor and Council to the courts), Hancock, governor, vetoed the resolve as violating the constitution. He said: "If the General Court [the legislature] have any right to enact or decree a divorce, they have it by force of the constitution, and had it while this business was in the hands of the Governor and Council as fully as they now have it; and, if they then had it, the Governor and Council were not vested with exclusive power to try 'all causes' of this nature."[2] "It is not known," observes Metcalf, J., "that the legislature have since attempted to dissolve a marriage."[3] If the term "all causes of divorce," as used in the constitution, does include a legislative divorce, as well as a judicial, plainly the reasoning of the governor was correct; the legislature had no power left it over any "cause" of divorce. The only question which could remain would be, whether a legislative divorce is not to be deemed as proceeding without cause, and therefore not embraced within the term "all causes of divorce."[4]

§ 689. **As to Legislative Divorces being for Cause.** — It is not apparent upon what principle a legislative divorce can be, in any proper, legal sense, for cause. When there is a *cause*, — that is, when one party has committed an offence which *entitles* the other to the remedy, — it would seem, that the ascertainment of the fact, and the sentence of law following, must be viewed only as an exercise of judicial power, not competent to the legislature.[5] But on the other hand, a divorce act, like every other statute, would appear necessarily to flow merely from the sovereign will. It is not the ascertainment of a right, but the creation of one.[6] In its creation, however, as in the

[1] Const. Mass. part 2, c. 3, art. 5.
[2] 12 Mass. Senate Journal, 191.
[3] Shannon *v.* Shannon, 2 Gray, 285.
[4] And see ante, § 658 *a*.
[5] Ante, § 682.
[6] "It would seem," observes Marshall, C. J., of Kentucky, "that a legislative divorce can be regarded as an exercise of the purely legislative function only, if at all, when it is founded upon the mere will or discretion of the legislature, without reference to the

enactment of all other laws, the individual legislators are not supposed to proceed blindly, and therefore the petitioner presents to them *reasons*, such as he thinks best calculated to influence their minds; yet this motive power can hardly be regarded as a *cause* for divorce. Now, if we admit the distinction laid down in Maine and Iowa,[1] we come to this conclusion, — that a legislative divorce is good or not, according as the petitioner might have obtained, or not, a decree in the courts; and, if there was an offence unknown alike to him and the legislature, it would still overturn the divorce, rendering it invalid, simply because a greater wrong has been inflicted than was supposed. But even a party who proceeds in court may allege any one of several sufficient causes, and take a decree based solely on that one; so, as the legislative power acts without cause, while the courts do not, why should its action be construed as interfering with them? or as being the exercise of a jurisdiction concurrent with theirs? A legislative divorce, moreover, is essentially a different thing from a judicial; although it bears the same name, and, to a certain extent, answers the same end.

§ 690. **Continued — Fraud.** — In Pennsylvania, however, the distinction taken by the judges in Maine and Iowa appears to be necessary. There the amended constitution of the State provides, that "the legislature shall not have power to enact laws annulling the contract of marriage, in any case where, by law, the courts of this Commonwealth are or may hereafter be empowered to decree a divorce;" and, if legislation were not deemed to proceed on some cause, and if the judiciary could not go behind a legislative act in which none appears and ascertain what the cause was, this constitutional inhibition would fail to accomplish any purpose whatever. Therefore, to give effect to the inhibition, the cause may be thus inquired into. But it was also apparently decided, that the court could not take cognizance of any fraud in the procurement of the divorce act.[2]

breach of any existing contract or law." Gaines *v.* Gaines, 9 B. Monr. 295, 307.

[1] Ante, § 684.

[2] Jones *v.* Jones, 2 Jones, Pa. 350. See ante, § 687. If the legislature dissolves a marriage, it is presumed to have acted on a sufficient cause shown. Cronise *v.* Cronise, 4 Smith, Pa. 255.

§ 691. **Kentucky — Fraud — Cause pending in Court.** — In Kentucky, a wife brought her bill for alimony; the husband filed an answer in the nature of a cross-bill for divorce. Before the hearing, he, to defraud her of her property and claim to be supported out of his estate, procured from the legislature an act dissolving the marriage; which act he set up in a supplemental answer. After this, he died; and she filed her bill of revivor against the executor and heirs, demanding dower and distribution as widow. Here a fraud was attempted upon her; and the court held, that, under the circumstances, her claim should not be defeated by it. "The question," observed Marshall, C. J., who delivered the opinion, "is not simply, whether the legislature may, under any circumstances, constitutionally enact that A be divorced from B; but whether, when it is manifest that a party, after having sought a divorce in a judicial tribunal, and while his suit is there pending, abandons that forum and resorts to the legislative power for the sole purpose of affecting and defeating the legal and equitable rights of his wife in his property, the divorce, granted by the legislature on such application, can, without disregarding the division of powers and distinction of departments established by the constitution, and the security of private rights of contract and of property therein granted, be considered as affecting to any extent the rights of property involved in the question of divorce. We are of opinion that it cannot. . . . . If it were conceded, as intimated in McGuire *v.* McGuire,[1] that the marriage contract is not a contract wholly removed, like other contracts, from the power of the legislature to dissolve it in any particular case by special act of divorce; and that the dissolution of a marriage, if required by the public good, may be a legislative function; still, it cannot be admitted, that a power thus deduced, uncertain upon principle as to its existence, and still more uncertain as to the grounds of its legitimate exercise, can override the express and highly conservative prohibitions in the constitution, intended for the protection of private rights of property. We are of opinion, therefore, that whatever power, to be exercised in view of the public good, the legislature may have to enact divorces in special cases; as it cannot, even for

[1] McGuire *v.* McGuire, 7 Dana, 181.

the public good, change the right of private property from one to another without compensation; much less can it do so by special act of divorce, sought by one of the parties against the consent of the other, with the purpose of affecting or operating upon the rights of property incident to the marriage relation, as created and sustained by the general laws applicable to that relation. And the wife having taken no advantage of any privileges afforded by the divorce, she is in no manner precluded from contesting its operation. . . . . Under these views, and without deciding upon the effect of legislative divorces so far as they may operate upon the personal relations and abilities or disabilities of the parties, we conclude, that the divorce in this case is inoperative as respects the rights of property involved, and cannot deprive the wife of her interest in the estate of her husband as it would have existed had there been no divorce." [1]

§ 692. **Continued.** — Of this case it may be observed, that the claim which the woman sought in her supplemental bill to enforce depended solely on her being the man's widow; that is, on the *vinculum* of the marriage remaining unbroken at the time of his death; [2] so that, if the legislative divorce was valid for any purpose, it must have defeated this suit. If we admit, therefore, the authority of this case, we must consider it either as having been decided on the ground of fraud,[3] or as asserting the principle, which certainly appears highly reasonable, that the legislature cannot constitutionally grant a divorce to a party who has, at the same time, a suit for that purpose pending in the courts. And in confirmation of this latter view we have the general principle, that the tribunal which first takes jurisdiction of a matter is entitled to exercise the jurisdiction to its close.[4]

§ 692 *a*. **Maine — Special Authority to the Court.** — We have

[1] Gaines *v.* Gaines, 9 B. Monr. 295. See also Jones *v.* Jones, 7 Legal Intelligencer, 19, 1 U. S. Mo. Law Mag. 300, 2 Jones, Pa. 350; ante, § 690.

[2] Levins *v.* Sleator, 2 Greene, Iowa, 604.

[3] And see Richardson *v.* Wilson, 8 Yerg. 67, where Peck, J. intimates a query as to the constitutional validity of a legislative divorce granted on the petition of the husband, and a hearing *ex parte*, without notice to the wife. The divorce, however, was treated as valid, neither party seeking to draw it in question.

[4] Mason *v.* Piggott, 11 Ill. 85; 1 Bishop Mar. Women, § 634.

seen[1] that, in Maine, a legislative divorce is held to be good if rendered in a case in which, under existing laws, the courts have no jurisdiction.[2] This being settled, a case was presented to the legislature in which, by reason of the parties not having been married or having cohabited or the cause having occurred there, the court under the statutes had no jurisdiction. But the legislature, instead of granting the divorce, committed the authority over the case to the court. Thereupon this special act was, *in Massachusetts*, held to be void under the Constitution of *Maine* as granting a special indulgence by way of exemption from the general law.[3] It is not proposed to discuss this decision; it is something very unusual for the courts of one State to pass upon the validity, within the State constitution, of a statute enacted in another State, and the report does not disclose by what helps as to the foreign law this was done in the present instance. As the construction and applicability to a case of a foreign statute are properly provable by the expert testimony of the practitioners in the foreign court, and others who are particularly acquainted therewith, and as the legislature of Maine was composed of persons who were constitutionally qualified to pass in the first instance upon the meaning and effect of the Maine Constitution which they were officially sworn to support, of course the Massachusetts court did not overrule the Maine adjudication of the question, contained in the enactment itself, without some help concerning the foreign law other than what proceeds from those general considerations which might have been properly resorted to if the case had been a Massachusetts one. Therefore, by reason of the report not furnishing full information as to what was done, this case could not furnish a precedent for other courts on the latter point. Then, as to the former point, it being settled in Maine, that the legislature had authority, by special act, itself to dissolve the marriage, there is fair ground for the inference, that, therefore, it could by the like special act commit the power to the courts; this was no more a granting of a special indulgence by way of exemption to the general law than the other would have been. The cases referred to by the

[1] Ante, § 684.

[2] Adams *v.* Palmer, 51 Maine, 480.

[3] Simonds *v.* Simonds, 103 Mass. 572.

Massachusetts court were cases in which the legislature did not, as in this instance, possess within itself the power of giving the relief sought. There is, therefore, abundant room to maintain a distinction between the two classes of cases.

VI. *How the Divorce is limited in its Effect.*

§ 693. **General Doctrine — Rights of Property — Alimony, &c.** — We have seen that a legislative divorce is a law; a judicial one, a decree; that a statute cannot divest vested rights, but a sentence of court may.[1] The legislature, therefore, cannot, in its divorce act, divest the husband of vested rights of property, and bestow them upon the wife. It cannot give the wife alimony, or any thing in the nature of alimony, out of the estate of the husband.[2] But as it snaps the vinculum of the marriage, whatever hangs upon it falls. Thus, if the man dies, the woman will not be his widow, nor entitled as such to dower and a portion of his personal property.[3] He will not, on her death, be authorized to hold her lands as tenant by the curtesy; but, on the contrary, his interest, and that of his grantees and representatives, in them, and in her choses in action, ceases immediately.[4] This is not a divesting of vested rights. "As well might it be urged, that a law annexing the punishment of death to a crime, should it happen to be committed by a tenant for life, was retrospective, and divested vested interests; because it deprived purchasers or creditors, under such tenants for life, of their estates." [5]

§ 694. **Voidable Marriage.** — Upon the view we have taken of this question, there may arise the further doubt, whether the legislature can so dissolve a voidable marriage that it will afterward be regarded as having been void in law from the beginning, — which is the common consequence of a judicial sentence of nullity. Looking at this query in the light of

[1] Ante, § 675, 678, 681, 682, 686, 689.

[2] Crane *v.* Meginnis, 1 Gill & J. 463; Holmes *v.* Holmes, 4 Barb. 295, 301; Townsend *v.* Griffin, 4 Harring. Del. 440; The State *v.* Fry, 4 Misso. 120, 193; Jackson *v.* Sublett, 10 B. Monr. 467. See, however, Berthelemy *v.* Johnson, 3 B. Monr. 90; West *v.* West, 2 Mass. 233; post, § 697–699.

[3] Levins *v.* Sleator, 2 Greene, Iowa, 604.

[4] Starr *v.* Pease, 8 Conn. 541; Townsend *v.* Griffin, 4 Harring. Del. 440.

[5] Daggett, J. in Starr *v.* Pease, supra.

principle, we have seen,[1] that the reason why the marriage is voidable (when it is so) instead of void, is, because the courts have no jurisdiction to inquire into the impediment in a collateral proceeding; but if they had, it would be void. Why, therefore, may not the legislature, which can always enlarge the *remedy* at pleasure, authorize the judicial tribunals to take cognizance of this matter as well in a collateral as a direct proceeding? And thus the legislative act would be made to have something like the effect of a sentence of nullity; that is, it would practically transform the marriage from a voidable to a void one; yet it might not, as to the past, estop inquiry, like the decree of a court. The point, however, has not received judicial elucidation.[2]

§ 695. **From Bed and Board — Alimony, again.** — We have seen, that the legislative divorce may be, and sometimes is, from bed and board;[3] yet that it cannot embrace also a provision for alimony.[4]

§ 695 *a*. **Estoppel.** — We have already seen[5] that the Missouri court has held legislative divorces to be invalid. In a recent case, the court seemed not to be quite satisfied with the doctrine; but, not undertaking to overrule it, held, that, though these divorces had already been adjudged to be unconstitutional, still, when parties after obtaining such a divorce lived separate for a period of twenty years, during which each contracted a new marriage, the divorce must be considered so far valid as to estop either from intermeddling with the affairs of the other. Therefore, if the wife so divorced wishes to dispose of lands constituting her separate estate, it is not necessary that her former husband should join in the conveyance.[6]

[1] Ante, § 109, 110.
[2] Ante, § 663.
[3] See Guilford *v.* Oxford, 9 Conn. 321.
[4] Ante, § 693.
[5] Ante, § 686.
[6] Richeson *v.* Simmons, 47 Misso. 20.

BOOK VII.

JUDICIAL DIVORCES.

CHAPTER XL.

WHETHER A GENERAL STATUTE MAY AUTHORIZE DIVORCE FOR CAUSES ALREADY EXISTING.

§ 696. **Nature of the Question — General View.** — Under what circumstances a statute will be construed to embrace antecedent causes of divorce, — that is, facts which transpired before it was passed, — is matter which we have already considered.[1] But suppose a statute does clearly embrace antecedent causes, is it, for this reason, and to this extent, unconstitutional? Now, this question involves some of the principles which were discussed in the last chapter, but not all of them. If legislative divorces are invalid as violating the constitutional provisions against laws impairing the obligation of contracts,[2] and retrospective laws,[3] then it may perhaps follow that the divorces contemplated in this chapter are invalid also. Marriage, as viewed by the divorce law, is not a contract; for it is the executed status which the contract of present consent to become husband and wife superinduced;[4] neither is marriage a vested right, which cannot be taken away by subsequent legislation under the name of retrospective laws, as the reader will see who follows the discussions on that subject in the last chapter.[5] And, *a fortiori*, statutes authorizing a judicial annulling of the marriage for causes already existing do not involve

[1] Ante, § 98–103.
[2] Ante, § 665–669.
[3] Ante, § 670–679.
[4] Ante, § 3–19, 669; Magee *v.* Young, 40 Missis. 164; Carson *v.* Carson, 40 Missis. 349.
[5] Ante, § 670–679.

an interfering, by legislative act, with a judicial jurisdiction.[1] Therefore the Mississippi court held the following statutory provision to be constitutional: "In all cases where parties have, prior to the passage of this act, lived separate and apart for the period of four years, within this State, and either of them may desire to be divorced from the bonds of matrimony, and have not lived separate and apart by collusion, and with the intent of procuring a divorce, it shall be lawful for them, or either of them, to file a bill setting forth such desire, and upon due proof of such living separate and apart, it shall be competent for the court to decree a divorce from the bonds of matrimony." Said Ellett, J.: "We regard marriage as a civil status, a matter *publici juris*, created by public law, subject to the public will, and not to that of the parties, who cannot dissolve it by mutual consent; that it is more than a contract, because it establishes fundamental domestic relations, affecting the welfare of the community, and because it is an institution of the State founded on reasons of public policy."[2]

§ 697. **Property Rights.** — At the same time, while the general doctrine is, on principle and on the better authorities, as thus stated, there is room for the suggestion, that, as to the effect which can be given to the divorce, it, like a legislative dissolution of the marriage, can only operate on such property rights as depend on the vinculum of the marriage, and cannot authorize such a collateral decree as for alimony.[3] The question has not been very thoroughly examined by the courts, yet it was held in Massachusetts, under an act to which we have already referred,[4] that, although the offence was committed previously to its passage, the court might still restore to the wife her personal property, which had vested in the husband. Sedgwick, J., observed: "By an intermarriage, the husband and wife during the coverture have, as a joint fund for their mutual benefit, the property which previously belonged to each, and also that which afterwards comes by either; and they have an inchoate title, which is consummated on survivorship, to certain proportions of this joint fund. The

[1] Ante, § 680–686.

[2] Carson *v.* Carson, supra; see p. 351 of the report.

[3] Ante, § 693.

[4] Ante, § 100.

legislature had an unquestionable right to prescribe what part of this joint fund shall go to each party in the event of a separation by divorce."[1] This decision, proceeding on an inaccurate statement of the legal property-relations subsisting between husband and wife, is therefore entitled to little weight except its bare authority as adjudged law within the sphere of the jurisdiction in which it was pronounced. Yet for all this it may be correct. In Kentucky it was in like manner held, that, if the legislature authorizes a court to investigate a particular case and grant, on the cause being established, a divorce from the bond of matrimony, and thereupon to make provision out of the husband's estate for the support of the wife, this is within its power and discretion; and the court may, under the act, invest the wife with the title to a tract of land which was the husband's.[2]

§ 698. **Contrary Doctrine — Conflicting Authorities.** — On the other hand, there are cases which hold that the legislature cannot authorize the courts even to dissolve the vinculum of the marriage, for a cause which has already transpired. Such a law, it was said, is retrospective and void.[3] And in one case the court laid down the very singular doctrine, that a statute of this nature is unconstitutional, as being an *ex post facto law*.[4] Still, the opinion we have considered, as having the better foundation in principle,[5] rests also upon a pretty good basis of judicial authority.[6]

§ 699. **Tennessee Doctrine.** — On this subject, the view taken by the court in Tennessee is worthy of consideration. A statute newly provided, that, when "any person hath been or shall be injured" by the husband or wife's commission of adultery, &c., the innocent party shall be entitled to a divorce. A suit having been brought under this enactment, for adultery committed before it became a law, the defendant set up in defence the clause of the constitution of the State, that "no retrospec-

[1] West *v.* West, 2 Mass. 223, 227.

[2] Berthelemy *v.* Johnson, 3 B. Monr. 90.

[3] Clark *v.* Clark, 10 N. H. 380; Jarvis *v.* Jarvis, 3 Edw. Ch. 462; Given *v.* Marr, 27 Maine, 212, 222; Sherburne *v.* Sherburne, 6 Greenl. 210; Greenlaw *v.* Greenlaw, 12 N. H. 200.

[4] Dickinson *v.* Dickinson, 3 Murph. 327.

[5] Ante, § 696.

[6] Jones *v.* Jones, 2 Overt. 2; Berthelemy *v.* Johnson, 3 B. Monr. 90; West *v.* West, 2 Mass. 223; Smith *v.* Smith, 3 S. & R. 248.

tive law, or law impairing the obligation of contracts, shall be made." The court overruled the objection, and Overton, J., in delivering the opinion, observed among other things as follows: "There is certainly a distinction between an act which is *malum in se*, and one which is in its own nature indifferent. The legislature ought to be competent to modify the means of suppressing vice, or affording a more competent remedy, when requisite. Adultery, by the law of nature, is an offence. It was so before the passage of this act, and an evil in any possible view of the subject. The act, by affording relief for a matter which was criminal in itself, must be considered as so far remedial, and not *ex post facto*, as has been contended. Blackstone and other writers define an *ex post facto* law to relate to public punishment; and this certainly was the sense in which the framers of the constitution received it, else why make use of retrospective also? This part of the act may in a general sense be called retrospective, but in legal phraseology it cannot be called *ex post facto*. In my view of the constitution, it cannot be construed in violation of it. The constitution says, that 'no retrospective law, or law impairing the obligation of contracts, shall be made.' Retrospective here was inserted from abundant caution. It was intended to embrace rights, and not modes of redress. The last, from the nature of things, must be left open to legislative modification. It is not possible for me to suppose that any body of enlightened men ever intended to put it out of the power of the legislature to provide a remedy for many past transactions, which the immutable principles of justice might require; such an institution must suppose absolute foresight in man, which we all know is not one of his attributes. The wisest government that ever existed could not possibly foresee many evils which might require a remedy consistent with justice and the law of our nature. The legislature [constitution?], as it appears to me, meant that the word retrospective should be restrained, in its acceptation, to contracts, but not marriage contracts, they being incapable, in their very nature, of the application of such a principle." [1]

[1] Jones *v.* Jones, 2 Overt. 2. And see the reasoning of the court in Berthelemy *v.* Johnson, 3 B. Monr. 90.

CHAPTER XLI.

FURTHER PRELIMINARY VIEWS.

§ 700. **Scope of the Discussion — Order of it.** — We approach now the consideration of the specific cause of divorce. We have already examined the various original defects, which make the marriage void or voidable; what we are now to inquire into are those breaches of matrimonial duty, which, occurring subsequently to the nuptials, authorize a dissolution of the marriage, or a suspension of it by a divorce from bed and board. While examining the various grounds of nullity, we confined ourselves chiefly to the law of the subject, and we shall pursue the like course here; leaving, for the second volume, a consideration of the pleading, practice, and evidence. In the first three editions of this work, which were in one volume, the law and the evidence were treated of together, and the pleading and practice were not discussed. But in the two-volume editions, where the pleading and practice have been added, it seemed better to follow the order above indicated; because, since the work was originally written, the statutes have generally provided for the submitting of divorce causes to juries, and it becomes specially important to separate the evidence from the law.

§ 701. **Scope, continued.** — It is not proposed, in the series of chapters, upon which we are now entering, to discuss every possible cause of divorce to be found in any American statute, but only such causes as have furnished matter for judicial decision. It would be gratifying to some readers, should the writer here bring together the several statutes of the respective States upon this subject, and mention what is cause of divorce in each State. And though the labor of doing this would be considerable, that labor would be cheerfully performed if any corresponding advantage could accrue to the reader therefrom. Suppose the labor to be accurately performed, — a thing of the greatest difficulty where the question is one of statutory law,

— the result would be useful only to such lawyers and their clients as were devising means to evade the laws of their own State, by obtaining, in some other jurisdiction a divorce which in most instances would be without legal effect. And then the question would be, not only what are the causes of divorce in sister States, but under what circumstances also their courts will entertain the complaint of persons removing into those States from other States, to avail themselves of breaches of matrimonial duty which occurred before the removal; so that, in this view, the investigation would have to be extended a great way. Then also there would have to be another investigation, namely, as to the intelligence, or the ignorance, or the pliability, of the respective judges and juries to be found in the several States; for, in causes in particular in which there is to be no defence, these considerations constitute what is truly a "great matter." Yet how can an author enter into this matter? Should he praise a particular locality to-day, saying, "Soft judicial ground lies here," the ground might dry up and be hard to-morrow.

§ 702. **Further of the Order of Discussion.** — Although it is the object of the author, in the chapters which immediately follow, to state only the law of the several causes, as distinguished alike from the pleading, the practice, and the evidence, yet it will sometimes be found nearly if not quite impossible to keep the line there distinctly in view, and cut smooth. And this difficulty is increased by the fact, that it is desirable to preserve entire, as much as possible, the sections of the early editions, which were prepared with reference to the law as existing in its practical administration at the time when they were written, and law and evidence were alike passed upon by the judge without the aid of a jury. Yet if this difficulty stood alone, it could be surmounted; the entire matter could, if desirable, be rewritten. But the great obstacle is, that judicial decision has not yet clearly drawn the line we are now considering. In the chapters which immediately follow, some suggestions upon this topic, with references to a few decisions, will be found; but it must be left to controversies hereafter to arise to make distinct in adjudication what chiefly can here be mentioned only in the way of legal theory.

CHAPTER XLII.

ADULTERY.

§ 703. **General View — Definition.** — Adultery is almost universally in this country a ground of divorce from the bond of matrimony. It is the voluntary sexual intercourse of one of the married parties with a person other than the husband or wife.[1] If the reader will turn to the author's work on Statutory Crimes[2] he will see, that, relating to this definition, there are some distinctions and differences of judicial opinion important in the criminal department of our law, not necessary to be considered here. For the offence which leads to the remedy of divorce can, of course, be committed only by a married person; and it is immaterial whether the *particeps criminis* is married or single.[3] In the time of slavery it was committed, likewise, by an unlawful commerce with a negro slave.[4]

§ 704. **Adultery by Man and Woman distinguished.** — Some persons have supposed, that, in legislation, a difference ought to be made between adultery in the wife and adultery in the husband; since the latter does not impose on the marriage a spurious issue, while the former may.[5] But neither the English practice, as it prevailed previously to the statute which created a judicial jurisdiction to divorce parties from the bond of matrimony,[6] nor the laws of the states of continental Europe generally,[7] make any difference, except that, in England, the practice of Parliament in granting divorce by special act was, to interfere as a general rule in favor of the husband, and as a general rule to refuse the remedy when the wife was applicant.[8] The recent

[1] "Adultery, by the law of Scotland, consists in the carnal connection of one of the married parties with any other person than him or her to whom he or she is married." 1 Fras. Dom. Rel. 656.

[2] Stat. Crimes, § 654–656.

[3] See 1 Swift's System, 192; Reeve Dom. Rel. 207; Commonwealth *v.* Call, 21 Pick. 509.

[4] Mosser *v.* Mosser, 29 Ala. 313.

[5] See Matchin *v.* Matchin, 6 Barr. 332; 2 Kent Com. 106; Shelford Mar. & Div. 395.

[6] Shelford, supra.

[7] Macqueen H. L. Pract. 482.

[8] Macqueen H. L. Pract. 474–486; Hosack Confl. Laws, 255 and note.

English statutes retain substantially the old law of divorces from bed and board in cases of adultery, calling them now judicial separations; but, as a substitute for the parliamentary practice, contain provisions, already quoted in this volume,[1] which, as respects the dissolution of the marriage, discriminate somewhat in favor of the husband. Adultery only in the wife is ground for dissolving the marriage at the suit of the husband; but, when the wife is applicant, there must be some other weight of guilt, besides a single act of simple adultery committed by the husband, cast into the scale, before the justice of her claim is permitted to prevail over opposing interests. The better view plainly is, that, whether the husband's adultery is a graver or less grave offence against the marriage than the wife's, the adultery of either ought to afford the other, if innocent, ground for dissolving the marriage bond.

§ 705. **Bond of Marriage or Bed and Board.** — We have seen,[2] that, in all probability, though there may be room for doubt on the point, all divorces were at the very early periods of the English law in one form, known as separations from bed and board, as well as by the shorter term divorce, and that they were in legal effect dissolutions of the marriage bond; but that, from time to time, the ecclesiastical authorities forbade remarriages in certain cases, till at length the present distinction between bed and board and the bond of marriage became established in the law, and the decree was made to follow in form the distinction thus introduced. However this may be, it is difficult for one who consults the ancient books to resist the conviction, that there was a time when the effect of a divorce for adultery, whatever its form, was to dissolve the marriage bond; and, though this proposition was not universally admitted at the time Godolphin wrote,[3] subsequent investigations cause it to be more generally so in later years. But afterward the law was changed; and, for a long series of years, until the year 1858, all judicial divorces in England, for causes arising subsequently to the marriage, were from bed and board, as the term is understood in the modern law.[4]

[1] Ante, § 65, note.
[2] Ante, § 661 and note.
[3] Godol. Abr. 500, 501.
[4] 2 Burn Ec. Law, 503; 1 Woodd.

§ 706. **How under American Common Law — Statutes.** — According to principles which we have already considered,[1] adultery, having been ground of divorce from bed and board in England at the time when this country was settled, is such also by the common law of our several States; while, however, as the remedy in England could be pursued only in the ecclesiastical courts, and as we have no such courts, this cause of divorce could be practically made available with us only by force of a statute giving the jurisdiction to some one of our tribunals. And in practice our statutes have generally directed, that the divorce should be from the bond of matrimony, not merely, as formerly in England, from bed and board. We have seen,[2] that, even now in England, when this full divorce is to be given to the wife, something more than ordinary and simple adultery must be alleged and proved against the husband. In our States generally, nothing more is required, whether the divorce is to be granted to the wife on her application, or to the husband on his.

§ 707. **Desertion and Living in Adultery.** — Yet in North Carolina there is or was a statute which made it ground of divorce "where either party has separated him or herself from the other, and is living in adultery;" under which statute, therefore, two things must concur, namely, first, the wrongful separation; secondly, the living in adultery. If, therefore, under this statute, a husband deserts his wife, or so conducts as to justify her in leaving him, and then she lives in adultery, he cannot have the divorce.[3] Neither is a single carnal act sufficient, though flagrant in its nature; there must be a living in adultery.[4] And there is or was a statute in Louisiana of a somewhat similar nature and construction. Under this statute it was not deemed necessary that the cause should be continuing at the time of suit brought.[5] The reader will see more of this matter further on.[6]

Lect. 258; Macqueen H. L. Pract. 470, note. Argument in Shaw *v.* Gould, Law Rep. 3 H. L. 55, 63.

[1] Ante, § 66 et seq.

[2] Ante, § 704.

[3] Whitington *v.* Whitington, 2 Dev. & Bat. 64; Moss *v.* Moss, 2 Ire. 55. See Wood *v.* Wood, 5 Ire. 674.

[4] Long *v.* Long, 2 Hawks, 189. As to the criminal offence of living in adultery, see Bishop Stat. Crimes, § 695 et seq.

[5] Adams *v.* Hurst, 9 La. 243.

[6] Post, § 825.

§ 708. *What is Adultery : —*

Points of Inquiry. — But in the consideration of these few special statutes, as well as those which generally prevail in this country, the principal questions to which the attention of the legal person is to be directed are, — what is adultery? and what are the proofs thereof, and what is the other procedure relating thereto? There is no difficulty, under this head, in separating the law from the fact. Let us proceed, in a few sections, to consider the first of these questions; the others will be brought under review in our second volume.

§ 709. **The Intent.** — In criminal law, to constitute adultery, as to constitute any other crime, there must be the criminal intent.[1] Does the same rule prevail in the law of divorce? A review of the authorities will show that it does. Unjust would it be, that a husband should have it in his power to cast his wife away because of any misfortune which, without the concurrence of her mind, might befall her; as, for instance, where she is the victim of rape, and the like.

§ 710. **Continued — Voluntary — Rape — Mistake of Fact.** — Therefore, for adultery to be the foundation for divorce, it must be voluntary. When the party is compelled by force or ravishment; or the wife has carnal knowledge of a man not her husband, through error or mistake, she believing him to be her husband; or when, in the words of Ayliffe, "the wife marries another man through a belief that her former husband is dead," and, during the continuance of this belief, lives in matrimonial intercourse with him; the offence justifying a divorce is not committed.[2] If a statute, in the case last mentioned, renders the second marriage voidable, not merely void, a continuance of the cohabitation under it after the former husband or wife is known to be alive, will not entitle such former husband or wife to a divorce; such party must first get a decree of nullity of the second marriage; and, if the parties to it

[1] See Bishop Stat. Crimes, § 663–666.

[2] Ayl. Parer. 226. The doctrine thus stated is also, in all its parts, the well settled Scotch law; though Erskine considers it hard to refuse the husband his divorce, and compel him to take back his wife, when she has cohabited with another man, even under a false rumor, *bona fide* believed, of his being dead. But hard though this may be in particular cases, the doctrine is unquestionably sound, and it should be enforced. And see 1 Fras. Dom. Rel. 81, 657; ante, § 298; Bishop Stat. Crimes, § 663–665.

then continue their cohabitation, he may have the marriage dissolved for this cause.[1]

§ 711. **Cohabitation under Void Marriage — Void Divorce — Connivance.** — If one of the married parties goes into another State or country, not changing in good faith his domicil, but for the mere temporary purpose of obtaining a divorce, and obtains it, imposing on the foreign tribunal (for unless imposed upon it would not grant a divorce to such a party), the divorce is, as we shall more fully see in another place, void. When, therefore, such party enters into a formal marriage with another person, the marriage is void; and cohabitation under it is such adultery as will lay the foundation for a divorce at the suit of the other party to the original marriage.[2] The case as thus put supposes that the party applying for the second divorce is innocent as respects the first one, having remained behind and not having participated in the fraud practised on the foreign court. But, on principle, speaking now without the help of specific adjudication, if the applicant for the second divorce was a partner in the fraud by which the first was obtained, such concurring party should be barred of the remedy for the subsequent unlawful cohabitation, on the ground of connivance. On the other hand, if the party who remained behind was guilty of no bad faith, and had no notice that the removal of the other to the foreign jurisdiction was merely temporary, or notice of any other fact which would render the divorce void, but was imposed upon the same as was the foreign judge, then, on principle, a subsequent marriage by such innocent party, and a cohabitation under this really void marriage, would not in law constitute adultery for which a divorce should be granted on prayer of the other party. Even if such remaining partner were guilty of collusion regarding the foreign divorce, would not still the other one be estopped to proceed for his divorce by reason of his conduct having amounted to connivance?

§ 712. **Insanity of Offending Party.** — On very familiar principles, if the carnal act is suffered to pass while the party to it is insane, the criminal offence of adultery is not committed.

[1] Valleau *v.* Valleau, 6 Paige, 207; ante, § 114.

[2] Leith *v.* Leith, 39 N. H. 20; McGiffert *v.* McGiffert, 31 Barb. 69, 13 Ind. 315, note.

Neither, therefore, will the act lay the foundation for a divorce.[1] Yet the Pennsylvania court, in one case, with considerable force of reasoning, contended, that, since the danger of a spurious issue is a main cause of allowing the divorce for adultery, and since the husband must be otherwise aggrieved by the incontinence of even an insane wife, if such a wife yields to the adulterous act under circumstances to render its repetition probable, this will be sufficient to dissolve the marriage.[2] But this doctrine has found no support elsewhere.[3] If the insanity should expose the wife to the danger of a repetition of the act, this would justify the husband in pursuing the more merciful course of restraining her.

§ 713. **Peculiar Religious Opinions.** — Plainly a party in a divorce suit cannot rely, in defence of his adulterous act, upon any pretended or real religious opinions favoring adultery, or concubinage, or polygamy. In a suit between Jews, Lord Stowell said: "It has been suggested, that the Jewish religious regulations allow concubines. By the Mosaic law, as at present received, is there any such privilege? If there be any such among the Jews themselves, it would be a great question how it could be attended to in a Christian court, to which they have resorted; and, if it could be noticed, it ought to have been specially pleaded; but I think it could not."[4] Indeed, it is believed that there are no circumstances in which, whether in a divorce case or any other, a party can plead his peculiar religious views as an excuse for violating the law of the land.

[1] Nichols *v.* Nichols, 31 Vt. 328; Wray *v.* Wray, 19 Ala. 522; Broadstreet *v.* Broadstreet, 7 Mass. 474.

[2] Matchin *v.* Matchin, 6 Barr, 332, 10 Law Reporter, 266.

[3] See Wray *v.* Wray, and Nichols *v.* Nichols, supra.

[4] D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 336.

CHAPTER XLIII.

CRUELTY.

§ 714. **General View — How the Chapter divided.** — In the last chapter, the principal object of which was to explain what is the adultery by reason whereof the innocent party may have a divorce, we found the entire matter simple and lying within a small compass. But in this chapter we come to a subject of a different sort. It is not plain, under all circumstances, supposing the facts of a case to be known, whether or not the particular conduct complained of is cruelty. While divorces were granted by judges who took into consideration both the law and the evidence, and had no help from a jury, the judge used to bring together into one mass the facts of a case and the law governing them; and in most instances without distinguishing the one from the other pronounced for or against the particular application. And what was esteemed law and what fact the reader of an opinion could not always easily discern. At the present time, in most of our States, these questions are passed upon by a jury, while the court still judges of the law. In consequence, therefore, of the necessity of drawing the line which separates law and fact, the difficulties of the subject are considerably increased. We shall discuss it in the following order: I. The Definition and Nature of Legal Cruelty; II. Some Particular Propositions connected with the General Doctrine; III. The Relative Rights and Duties of Husband and Wife; IV. Cruelty by the Wife to the Husband; V. The Effect of Ill Conduct in the Complaining Party; VI. The Distinction between the Law and the Evidence on this Subject.

I. *The Definition and Nature of Legal Cruelty.*

§ 715. **Views of the Definition — Some Forms of it.** — It has been found difficult for writers on the law, in any of its departments, to lay down definitions at once exact, comprehensive, and neat, satisfying both the legal and literary taste, embracing nothing which does not truly belong to the thing defined, excluding nothing which does belong to it; and the whole cut at a single stroke from the quarry of legal truth, as though a sculptor should bring forth a finished statue with one blow like that wherewith Moses drew water from the rock. And of those things in the law which require definitions, there is no one more difficult to define than legal cruelty. In the first and second editions of this work it was set down as being "any conduct, in one of the married parties, which furnishes a reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the other." In the third edition, the definition was elongated thus: "Cruelty is such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehension of bodily harm as materially to interfere with the discharge of marital duty."

§ 716. **Continued.** — Of these two definitions, the former is the more neat, and the latter is the more exact. The change was prompted by the desire to render more plain and certain the line which divides conduct amounting to legal cruelty, from conduct of the like nature and tendency falling short of this. These varying definitions are in substance alike, and they have received the commendation of eminent judges, in cases to which the writer deems it not necessary to refer. Proceeding now with the discussing of the subject, we shall, among other things, make a third attempt at definition; the object still being to attain greater exactness.

§ 717. **Views of Cruelty as Ground of Divorce — How defined, continued.** — Cruelty, termed in the civil law, and sometimes in the ecclesiastical, *sævitia*,[1] is a ground of divorce from bed and board, in England, and in some of our States; while in

[1] Holden *v.* Holden, 1 Hag. Con. 453, 4 Eng. Ec. 452.

other States the divorce for this cause is from the bond of matrimony. The courts have been cautious about laying down any affirmative definition of this offence. Lord Stowell,[1] Sir John Nicholl,[2] and Dr. Lushington[3] have severally declined to do so; considering it more safe not to travel much beyond negative descriptions. An examination of the authorities will, however, show, that legal cruelty can be defined affirmatively as well as many other things in the law to which affirmative definitions are given; not indeed in a few faultless words, which carry entire precision and certainty, and mark the boundary with unerring distinctness, but in terms sufficiently accurate for most practical purposes. Cruelty, therefore, is such conduct in one of the married parties as endangers, either apparently or in fact, the physical safety or health of the other, to a degree rendering it physically or mentally impracticable for the endangered party to discharge properly the duties imposed by the marriage.[4] The reader perceives, that,

[1] Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 311. In another case, however, this eminent judge observed: "The definition of legal cruelty is that which may endanger the life or health of the party. The complaint generally proceeds from the wife as the weaker person; but it may come from the man, and has so done in several cases; but generally the wife complains of what is dangerous to her, on the showing of which the court releases her from cohabitation." Waring *v.* Waring, 2 Phillim. 132, 1 Eng. Ec. 210, 211; s. c. 2 Hag. Con. 153.

[2] Westmeath *v.* Westmeath, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 270.

[3] Neeld *v.* Neeld, 4 Hag. Ec. 263.

[4] Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 312. In Lockwood *v.* Lockwood, 2 Curt. Ec. 281, 7 Eng. Ec. 114, 115, Dr. Lushington considered the substance of the doctrine laid down in Evans *v.* Evans, to be, that "there must be either actual violence committed, attended with danger to life, limb, or health, or there must be a reasonable apprehension of such violence." In the late case of Tomkins *v.* Tomkins, 1 Swab. & T. 168, 172, Cresswell, J., said to the jury: "It will be for you, on a consideration of the evidence you have heard, to determine whether the husband has so treated his wife and so manifested his feelings towards her, as to have inflicted bodily injury, to have caused reasonable apprehension of bodily suffering, or to have injured health." See also, in support of the definition given in the text, Harris *v.* Harris, 2 Phillim. 111, 1 Eng. Ec. 204; Bramwell *v.* Bramwell, 3 Hag. Ec. 618, 5 Eng. Ec. 232, 241, 242; Westmeath *v.* Westmeath, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238; Barlee *v.* Barlee, 1 Add. Ec. 301, 305; Perry *v.* Perry, 2 Paige, 501; Whispell *v.* Whispell, 4 Barb. 217; Kenrick *v.* Kenrick, 4 Hag. Ec. 114, 129; Dysart *v.* Dysart, 1 Robertson, 470, 533, 546; Curtis *v.* Curtis, 1 Swab. & T. 192; Butler *v.* Butler, 1 Parsons, 329; Harratt *v.* Harratt, 7 N. H. 196; D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 336; Kenley *v.* Kenley, 2 How. Missis. 751; Smallwood *v.* Smallwood, 2 Swab. & T. 397, 402; Smedley *v.* Smedley, 30 Ala. 714; Sharman *v.* Sharman, 18 Texas, 521, 525; Mahone *v.* Mahone, 19 Cal. 626; Morris *v.* Morris, 14 Cal. 76; Richards

in such a case, a separation becomes necessary; consequently the law, taking cognizance of the necessity, grants a divorce.

v. Richards, 1 Grant, Pa. 389; Everton *v.* Everton, 5 Jones N. C. 202; Wand *v.* Wand, 14 Cal. 512; Cole *v.* Cole, 23 Iowa, 433; Hughes *v.* Hughes, 44 Ala. 698; Powelson *v.* Powelson, 22 Cal. 358, 360; Davies *v.* Davies, 55 Barb. 130; 37 How. Pr. 45. In a Georgia case, Warner, C. J., said: "Legal cruelty may be defined to be such conduct on the part of the husband as will endanger the life, limb, or health of the wife, or create a reasonable apprehension of bodily hurt. What must be the extent of the injury, or what particular acts will create a reasonable apprehension of personal injury, will depend upon the circumstances of each case." Odom *v.* Odom, 36 Ga. 286, 317. The above-cited case of Evans *v.* Evans, decided by Lord Stowell in 1790, is one of the master-productions of his luminous intellect. It has been regarded ever since as the leading authority on this subject, and has been approvingly commented upon in almost every subsequent decision, English or American. The following most material extract has, in this way, gained almost the weight of a statute; and, though the leading principles it enforces will be found interspersed through the text of this chapter, it may be profitably read here: "*What is cruelty?* In the present case it is hardly necessary for me to define it; because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health, and even the life of the party. I shall, therefore, decline the task of laying down a direct definition. This, however, must be understood, that it is the duty of courts, and consequently the inclination of courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. The rule of *per quod consortium amittitur*, is but an inadequate test; for it still remains to be inquired, what conduct ought to produce that effect, whether the *consortium* is reasonably lost, and whether the party quitting has not too hastily abandoned the *consortium*. What merely wounds the mental feelings is in few cases to be admitted, where not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and, if this cannot be done, both must suffer in silence. And if it be complained, that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is, that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further; they cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove. Still less is it cruelty, where it wounds not the natural feelings, but the acquired feelings, arising from particular rank and situation; for the court has no scale of

§ 718. **Effect of the Statutes on the Definition.** — We have seen, that, in this country, where we never had ecclesiastical courts, all jurisdiction to grant divorces is created by express

sensibilities by which it can gauge the quantum of injury done and felt, and therefore, though the court will not absolutely exclude considerations of that sort, where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed. Of course the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number among its necessaries, is not cruelty. It may, to be sure, be a harsh thing to refuse the use of a carriage, or the use of a servant; it may in many cases be extremely unhandsome, extremely disgraceful to the character of the husband; but the ecclesiastical court does not look to such matters; the great ends of marriage may very well be carried on without them; and, if people will quarrel about such matters, and which they may do in many cases with a great deal of acrimony, and sometimes with much reason, they yet must decide such matters as well as they can in their own domestic forum. These are the negative descriptions of cruelty; they show only what is *not* cruelty, and are yet perhaps the safest definitions which can be given, under the infinite variety of possible cases that may come before the court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke, and the other books of practice, is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited, in which the court has granted a divorce without proof given of a *reasonable apprehension* of bodily hurt. I say an *apprehension*, because assuredly the court is not to wait till the hurt is actually done; but the apprehension must be *reasonable;* it must not be an apprehension arising merely from an exquisite and diseased sensibility of the mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance, by calling in the succors of religion and the consolation of friends; but the aid of courts is not to be resorted to in such cases with any effect." Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 311. "I am tempted to say here, as to this last point, that no *mere vexation*, whether petty or great, should be deemed sufficient in a case of cruelty; still, on the other hand, if a man has a wife of "diseased sensibilities," he is not justified in treating her as he might lawfully do if her sensibilities were not diseased. In marriage, the parties are required to consider each other's natures, and especially their diseases, whether of body or mind. A man whose wife is sick cannot justly require her to work as he might do if she were well. And this rule applies to every thing else of the sort. A woman of exquisite nerves, whether affected by disease or not, is as much to be protected as the woman who is composed of iron. A husband has no more right to endanger the physical nature of the former than of the latter. And every act of cruelty is properly to be estimated by its effect upon the particular person on whom it is inflicted; and this depends as much on the peculiar qualities of the person as on the act itself.

statutes.[1] The words of the statutes giving a jurisdiction in cases of cruelty differ in the respective States; but, in legal import, they are, with a few exceptions, substantially alike. Thus, the several phrases, "cruel, inhuman, and barbarous treatment;"[2] "extreme cruelty;"[3] "cruel, barbarous, and inhuman treatment;"[4] "cruel and inhuman treatment," and such conduct on the part of a husband toward his wife as renders it "unsafe and improper for her to cohabit with him;"[5] "when the husband shall have, by cruel and barbarous treatment, endangered his wife's life, or offered such indignities to her person as to render her condition intolerable, and life burdensome, and thereby forced her to withdraw from his house and family;"[6] "intolerable cruelty;"[7] "cruelty of treatment;"[8] "extreme and repeated cruelty;"[9] — are considered to mean, either in substance or in exact outline, the same thing as the *sævitia*, or cruelty, of the English ecclesiastical courts. But the statutes of Texas, Louisiana, Arkansas, and perhaps some other States, are in more comprehensive terms, and are held to authorize a divorce for a degree of ill treatment insufficient in the ecclesiastical law.[10]

§ 719. **Apprehension of Danger — Quia Timet — Caution for Future Good Conduct.** — The reader perceives, from our definition of cruelty,[11] that the object of judicial interference in this

[1] Ante, § 71.

[2] Finley *v.* Finley, 9 Dana, 52. This is cause for divorce from bed and board; a wife may have a divorce from the bond of matrimony where her husband's "treatment to her is so cruel and barbarous and inhuman *as actually to endanger her life.*" Thornberry *v.* Thornberry, 2 J. J. Mar. 322.

[3] Warren *v.* Warren, 3 Mass. 321; Morris *v.* Morris, 14 Cal. 76.

[4] Moyler *v.* Moyler, 11 Ala. 620.

[5] Mason *v.* Mason, 1 Edw. Ch. 278.

[6] Butler *v.* Butler, 1 Parsons, 329. See post, § 722, note; Eshbach *v.* Eshbach, 11 Harris, Pa. 343.

[7] Shaw *v.* Shaw, 17 Conn. 189.

[8] Coles *v.* Coles, 2 Md. Ch. 341; Daiger *v.* Daiger, 2 Md. Ch. 335; Tayman *v.* Tayman, 2 Md. Ch. 393; Bowic *v.* Bowic, 3 Md. Ch. 51.

[9] Harman *v.* Harman, 16 Ill. 85. The cruelty need not, under the Illinois statute, be endured two years, though the words are, — "and for extreme and repeated cruelty, and habitual drunkenness for the space of two years." Ib. See also, concerning the Illinois statute, Vignos *v.* Vignos, 15 Ill. 186; Embree *v.* Embree, 53 Ill. 394.

[10] Post, § 724. The Wisconsin statute employs the words: "When the treatment of the wife by the husband has been cruel and inhuman, whether practised by using personal violence or by any other means; . . . or when his conduct toward her is such as may render it unsafe and improper for her to live with him." As to the construction of which statute, see Johnson *v.* Johnson, 4 Wis. 135. And see Pillar *v.* Pillar, 22 Wis. 658.

[11] Ante, § 717.

class of cases is, in the main, to furnish protection and adjust property rights in respect of the future; in other words, to prevent an apprehended harm. The divorce suit on this ground is, in effect, a proceeding *quia timet*. The court interferes, not so much to punish an offence already committed, as to prevent the commission of one.[1] Therefore Godolphin says: "If, by reason of the cruelty of the husband, the wife shall blamelessly flee from him; and the husband shall offer sufficient security or caution for his future good behavior to her, and her safety and peace with him, and the cruelty or ill-usage not such but that by such caution the wife's peace and safety may be undoubtedly secured; and she, notwithstanding, refuse to return, — in such case the law will not compel him to allow her alimony."[2] Still there is no reported instance in modern practice, wherein this principle has been carried to the extent of discharging from the suit the husband on his producing,

[1] Harris *v.* Harris, 2 Phillim. 111, 1 Eng. Ec. 204; Bramwell *v.* Bramwell, 3 Hag. Ec. 618, 5 Eng. Ec. 232, 241, 242; Lockridge *v.* Lockridge, 3 Dana, 28; Rhame *v.* Rhame, 1 McCord Ch. 197; Dysart *v.* Dysart, 1 Robertson, 106, 139, 470, 540; Neeld *v.* Neeld, 4 Hag. Ec. 263, 268, 270; Stephens *v.* Totty, Cro. Eliz. 908; Headen *v.* Headen, 15 La. 61; Moyler *v.* Moyler, 11 Ala. 620; Harratt *v.* Harratt, 7 N. H. 196; D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329; Lockwood *v.* Lockwood, 2 Curt. Ec. 281, 7 Eng. Ec. 114; Morris *v.* Morris, 14 Cal. 76; Wand *v.* Wand, 14 Cal. 512, 515.

[2] Godol. Abr. 509; Ayl. Parer. 59. The South Carolina courts have held, that a wife, who, on being ill used by her husband, brings suit for alimony (not a suit for divorce from bed and board, but for alimony only), is not obliged to go back to him on his offering to receive her and use her well, unless the offer is made in good faith, and under circumstances leading to the reasonable belief that it will be fulfilled. Threewits *v.* Threewits, 4 Des. 560; Taylor *v.* Taylor, 4 Des. 167. See also Jelineau *v.* Jelineau, 2 Des. 45. The general principle was laid down in a Virginia case, that the court will not grant alimony to the wife (in the peculiar suit called a suit for alimony), if the husband offers in good faith to receive her back, and treat her well. The question in such a case would seem to be, whether the court is satisfied the offer will be really carried into effect. Almond *v.* Almond, 4 Rand. 662. In New Jersey it is held, that, if a wife leaves her husband in consequence of his cruel treatment of her, and afterward brings her bill for divorce against him on the ground of the cruelty, he cannot aid his defence by serving notice on her, pending the bill, to return. Graecen *v.* Graecen, 1 Green Ch. 459. See, also, Kinsey *v.* Kinsey (cited in the next note), and Thompson *v.* Thompson, 1 Yeates, 78; 2 Dallas, 128; Head *v.* Head, 3 Atk. 295; Hansley *v.* Hansley, 10 Ire. 506. In Kenley *v.* Kenley, 2 How. Missis. 751, it was held, that, where a separate provision has been ordered for the wife, on account of her husband's cruel treatment, if he *bona fide* offers to cohabit with her, and to treat her kindly in the future, the separate maintenance will be discontinued.

during its pendency, security for his future good behavior. And it has been distinctly laid down, that a mere offer of amendment on the part of the husband will not necessarily relieve him from the consequences following by law upon his past cruelty.[1] In Scotland, by the old law, which accorded herein with the canon law, it was a relevant defence for the spouse accused of cruelty, on account of which a separation was prayed, to offer caution for future good conduct, and this remedy was sometimes ordered by the court; but the practice appears to have fallen into disuse.[2]

§ 720. **Apprehension in Mind of Wife only — Degree of the Danger — Reason for this Divorce.** — From the foregoing propositions we see, that the divorce for cruelty has its foundation in nature.[3] Unjust and unnatural would it be to compel a wife to continue a cohabitation which all persons could discern to be attended with personal danger to her. And if she herself were in fear, even though others were not fearful for her, and if her fear had been brought on by the improper conduct of her husband, reasonably leading to this result, nature would cry out in her behalf, admonishing us, that, in this state of fear, she could not discharge well the duties required of a wife; therefore she should be relieved from them.[4] Still the duties of wife may be done tolerably where there is great inquietude, humanity dwells not on the earth in a state of perfection; consequently, in the language of Lord Stowell, the causes which will justify this divorce must be "grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged."[5]

§ 721. **The Two Questions.** — When, therefore, we look at this matter of cruelty in a philosophical way, two distinct questions present themselves; namely, What is the nature of the harm to be apprehended? What acts must be done creating the apprehension? But practically we cannot well separate these questions, so we shall content ourselves with discussing some points severally connected with the two in succeeding sections of this chapter.

[1] Kinsey *v.* Kinsey, 1 Yeates, 78. And see the last note.

[2] 1 Fras. Dom. Rel. 463.

[3] Ayl. Parer. 229.

[4] And see Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 311.

[5] Evans *v.* Evans, supra.

II. *Some Particular Propositions connected with the General Doctrine.*

§ 722. **Harm to be Bodily, not Mental.** — The proposition seems to be, on the whole, well established in England and in most of our States, that the harm apprehended must be bodily harm, in distinction from mental suffering.[1] For while it is admitted, that pain of mind may be even more severe than bodily pain; and a husband disposed to evil may create more misery in a sensitive and affectionate wife, by a course of conduct addressed only to the mind, than if, in fits of anger, he were to inflict occasional blows upon her person;[2] still, it is

[1] Harris *v.* Harris, 2 Phillim. 111, 1 Eng. Ec. 204; Barlee *v.* Barlee, 1 Add. Ec. 301, 305; Kirkman *v.* Kirkman, 1 Hag. Con. 409, 4 Eng. Ec. 438; Oliver *v.* Oliver, 1 Hag. Con. 361, 4 Eng. Ec. 429, 430; Chesnutt *v.* Chesnutt, 1 Spinks, 196; Shaw *v.* Shaw, 17 Conn. 189; Moyler *v.* Moyler, 11 Ala. 620; Helms *v.* Franciscus, 2 Bland, 544; Boggess *v.* Boggess, 4 Dana, 307; Lucas *v.* Lucas, 2 Texas, 112; Kenley *v.* Kenley, 2 How. Missis. 751; Williams *v.* Fowler, McCleland & Younge, 269; Harwood *v.* Heffer, 3 Taunt. 420; Hughes *v.* Hughes, 19 Ala. 307; Daiger *v.* Daiger, 2 Md. Ch. 335; Bowie *v.* Bowie, 3 Md. Ch. 51. In a late Scotch case, before the House of Lords on appeal, Lord Brougham said of the English law on the point in the text: "There is so much dictum, there are so many opinions or inclinations of opinions ventilated, which have a tendency to go further, that, if a case were to arise such as that which the ingenuity of some of the learned judges in Scotland supposed, I have very little doubt that we should find the rule considerably extended, and that that which only now rests upon opinions, more or less distinctly expressed in the shape of dicta, would assume the form ultimately of decision; namely, that, if the husband, without any violence or threat of violence to the wife, without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, were to exercise mere tyranny, to utter constant insult, vituperation, scornful language, charges of gross offences utterly groundless; charges of this kind made before her family, her children, her relations, her friends, her servants; insulting her in the face of the world and of her own domestics, calling upon them to join in those insults, and to treat her with contumely, and with scorn; if such a case were to be made out, or, even short of such a case, namely, injurious treatment which would make the marriage state impossible to be endured, rendering life itself almost unbearable, then I think the probability is very high that the consistory courts of this country would so far relax the vigor of their negative rule, at present somewhat vague, as to extend the remedy of a divorce *a mensa et thoro* to a case such as I have put." Paterson *v.* Paterson, 7 Bell Ap. Cas. 337, 366, 12 Eng. L. & Eq. 19, 30. I am afraid Lord Brougham was mistaken about there being even dicta, to any great extent, in favor of these views. At any rate, there are many dicta the other way; a specimen of which may be found in the still later English case of C. *v.* C., 28 Eng. L. & Eq. 603, 605. And see Milford *v.* Milford, Law Rep. 1 P. & M. 295. But we are here supposing, the reader should observe, that the mental suffering does not also affect the health of the body.

[2] See ante, § 40, 41. And see the observations of Sir John Nicholl, in

said, that, in such a case, "the court has no scale of sensibilities by which it can gauge the quantum of injury done and felt." [1] The rule, therefore, seems to have arisen, not from any notion of its inherent justice, but from the difficulty of practically administering the opposite rule, of regarding the mind the same as the body.[2]

Durant *v.* Durant, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 327, 328. "There are other sufferings," observes Dewey, J. in Pidge *v.* Pidge, 3 Met. 257, 261, "not less intense than those occasioned by bodily wounds. Angry words, coarse and abusive language, grossly intemperate habits, might bring greater sufferings upon a refined and delicate woman, than a single act of violence upon her person."

[1] Lord Stowell, in Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 311. And see Cheatham *v.* Cheatham, 10 Misso. 296. In the Supreme Court of Pennsylvania, and with reference to the statute of that State providing for a divorce where the husband shall offer to the wife "such indignities to her person as to render her condition intolerable and her life burdensome," Coulter, J. observed: "To render the condition of a wife intolerable, and her life burdensome, it is not necessary that there should be blows, or cruel and barbarous infliction of batteries that endanger her life. There may, without that, be such indignities to her person as to render her life a burden. The husband is bound to the observance of duty to his wife; and as marriage is founded on the original constitution of the sexes, and dignified by strong and peculiar sentiments of affection, delicacy, and honor, all treatment which violates these principles, habitually and constantly, and proceeds avowedly from hatred, revenge, and spite, and which renders even the hours devoted to repose hours of weeping and distress, must render a woman's condition intolerable, and her life burdensome. Yet all these, and more, were present at this ill-fated marriage, to induce the libellant to seek peace in the dissolution of a contract which the respondent admitted was entered into on his part to revenge former slights, or rejections of his suit." Elmes *v.* Elmes, 9 Barr, 166. It is presumed, however, that the court did not fully intend to establish a doctrine variant from the English rule; for nothing other than the above language appears in the report indicating such a conclusion. And a few months later the Court of Common Pleas of the same State affirmed, under the statute, the English rule, in a case which was ably discussed at the bar, and much considered by the judges. Butler *v.* Butler, 1 Parsons, 329. So, under a similar statute, did the Court of Appeals of Kentucky, Finley *v.* Finley, 9 Dana, 52. See also Mayhugh *v.* Mayhugh, 7 B. Monr. 424; Thornberry *v.* Thornberry, 2 J. J. Mar. 322; Jelineau *v.* Jelineau, 2 Des. 45.

[2] Dr. Lushington, in 1854, stated the matter thus: "If it be said that the consequences to the wife [in a case where no direct bodily injury was threatened or suffered, but there was great harshness of language and conduct, arising from drunkenness] are mental suffering and bodily ill-health, . . . the same might be said of other vices; of gaming, for instance; of gross extravagance, to the ruin of a wife and family; — all these might occasion great mental suffering, and, consequent thereon, bodily ill-health to the wife; but they do not constitute legal cruelty. Such consequences, to be the subject of legal redress, must emanate from bodily ill-treatment, or threats of the same. Such I apprehend to be the clear line of distinction drawn by all the authorities." Chesnutt *v.* Chesnutt, 1 Spinks, 196, 198; s. c. *nom.* C. *v.* C., 28 Eng.

§ 723. **Views of Continental Lawyers — Scotch.** — The rule mentioned in our last section, of limiting the divorce to cases in which the danger extends to the body, in distinction from the mind, appears not to be in accordance with the views of the jurists of continental Europe; while in Scotland the more enlarged rule, of regarding the mental suffering and danger equally with the physical, has struggled also for a doubtful existence. Thus, in Scotland, where a husband publicly and perseveringly reproached his wife, falsely, with lascivious behavior and immoderate lust, the Commissaries and the Court of Session held this to be a sufficient ground for a judicial separation; but the House of Lords reversed the decision.[1] In subsequent cases, however, opinions have been indicated by the Scotch courts to the effect, that a course of harsh and contumelious usage — which might be practised without any personal violence, and be more harassing to the feelings and more insupportable than personal violence offered in the heat of passion — would be sufficient.[2] The latter opinion, indeed, appears to have received countenance in the House of Lords;[3] but, in a comparatively recent case, this tribunal, on a Scotch appeal, went far to shake the doctrine;[4] and we may not be able, on the whole, to say precisely what is the present Scotch law relating to this point.[5]

§ 724. **Louisiana — Texas — "Excesses," "Outrages," &c.** — In Louisiana, the code of which State provides for a divorce from bed and board for excesses, cruel treatment, and outrages of such a nature as to render the living together of the parties insupportable, it is held, that "a series of studied vexations and provocations on the part of a husband, without ever resorting to personal violence, might constitute that degree of cruel treatment and outrage which would form a just ground for a separation from bed and board."[6] And in Texas, a similar

L. & Eq. 603. But we shall by and by see, that, when the bodily health does suffer, the court interferes, though there is no direct or otherwise indirect physical injury threatened.

[1] Leckie *v.* Moir, A. D. 1750. See 1 Fras. Dom. Rel. 456.

[2] 1 Fras. Dom. Rel. 456.

[3] Arthur *v.* Gourlay, 2 Paton, 184.

[4] Paterson *v.* Paterson, 7 Bell Ap. Cas. 337.

[5] See 45 Law Mag. 61, where, however, the views of the writer are hardly borne out by the cases he cites. And see Fulton *v.* Fulton, 12 Scotch Sess. Cas. 1104.

[6] Tourne *v.* Tourne, 9 La. 452, 456. Of course, blows inflicted on the wife

statute, authorizing a divorce from the bond of matrimony, has received substantially the same construction.[1] Yet even in Texas it was decided, that occasional sulkiness, a gadding disposition, and so much inattention to appropriate duties as to compel the husband in one instance to mend his own coat, are not adequate ground.[2] Neither is the commission of theft, forgery, or other crime, sufficient; since this is an infraction of the husband's duties to society, not an outrage inflicted particularly upon the wife.[3]

§ 725. **How in Principle.** — When we look at the point now under consideration in the light rather of legal principle than of precise legal authority, we are led into the following observations: Starting from the proposition already mentioned,[4] that the divorce suit for cruelty has its foundation in nature, since nature does not allow to woman the capacity of discharging well the duties of wife while she is in bodily fear, — we proceed, by only a single step, to the further proposition, resting as completely in nature as the other, that the woman whose soul is continually wrung with anguish by the hands of her husband, cannot, whatever she may desire, discharge to him well the duties of wife. And if she cannot, then nature demands her freedom from the obligation to do the impossible thing. And although the court may not, as Lord Stowell said, have "any scale of sensibilities by which it can gauge the quantum of injury done and felt,"[5] it may sometimes perceive that it is greater than can be practically endured, as well when it is made to fall on the mind as on the body. In the latter instance, the court may doubt whether it is sufficiently heavy to demand judicial relief; it can no more than doubt in the former. And whether the injury is of one sort or another, the court must be made affirmatively to perceive that it exists in fact, and is suf-

by the husband are sufficient. Armant *v.* Her Husband, 4 La. Ann. 137. It is the same substantially in Arkansas. Rose *v.* Rose, 4 Eng. 507; and in Missouri, Bowers *v.* Bowers, 19 Misso. 351.

[1] Shreck *v.* Shreck, 32 Texas, 578.

[2] Sheffield *v.* Sheffield, 3 Texas, 79; Byrne *v.* Byrne, 3 Texas, 336, 340; Wright *v.* Wright, 6 Texas, 3; Nogees *v.* Nogees, 7 Texas, 538.

[3] Lucas *v.* Lucas, 2 Texas, 112; Wright *v.* Wright, 6 Texas, 3; Sherman *v.* Sherman, 18 Texas, 521, 525. As to the Texas law, see, further, Taylor *v.* Taylor, 18 Texas, 574; Camp *v.* Camp, 18 Texas, 528.

[4] Ante, § 720.

[5] Ante, § 722.

ficient in degree, before it can grant the remedy. "If it be true," said Perkins, J., in an Indiana case, "that we are possessed of social, moral, and intellectual natures, with wants to be supplied, with susceptibilities of pain and pleasure; if they can be wounded and healed, as well as the physical part, with accompanying suffering and delight, then, we think, that conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classed as cruel, and entitle the sufferer to relief. And in point of fact we have no doubt, that mere cold neglect has sent broken-hearted to the grave hundreds of wives, where the dagger, poison, and purposed starvation have sent one. Men generally supply a sufficiency of food to their brute animals." [1] The doctrine suggested in this section is not opposed by the peculiar language of our statutes generally. The term cruelty, if it means simply what it means in the English law, still embraces whatever a true construction of the English law implies; though modern English judges should be found to have narrowed its exposition, contrary to its inherent and original signification. If, again, the term, as employed in our statutes, is to have its popular exposition, then plainly it extends as far as is herein intimated. For, in popular phrase, men are often cruel to their wives, though neither inflicting nor threatening blows.

§ 726. **Mental Injury as aiding Bodily.** — Still, assuming cruelty to exist only where there is either actual or threatened bodily harm, if a wife has shown that her husband has been guilty of acts tending to her bodily harm, she may then, from this foundation, introduce evidence of what is addressed only to the mind; for example, language and conduct designed to wound her feelings; [2] though the precise limit of this rule appears not to be very clearly defined. Thus a groundless and malicious charge against her chastity, or of incest,[3] when the foundation for this evidence is so laid, is considered a gross act of cruelty, and almost sufficient of itself; [4] though we have

[1] Rice *v.* Rice, 6 Ind. 100, 105.

[2] Whispell *v.* Whispell, 4 Barb. 217; Moyler *v.* Moyler, 11 Ala. 620; Saunders *v.* Saunders, 10 Jur. 143, 144. And see Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 327.

[3] Gale *v.* Gale, 2 Robertson, 421. So, generally, a charge of any crime. Nogees *v.* Nogees, 7 Texas, 538.

[4] Durant *v.* Durant, 1 Hag. Ec. 733, 769, 3 Eng. Ec. 310, 328; Bray *v.* Bray, 1 Hag. Ec. 163, 3 Eng. Ec. 76; Otway

seen that, standing quite alone, it is no cause for divorce.[1] And Dr. Lushington has observed, that foul and disgraceful language, addressed by the husband to his wife, "may not alone be cruelty in its legal sense; but the use of it would induce the court more readily to believe evidence as to personal violence; for it would manifest a total want of self-command, and the absence of all controlling principle."[2] So the habit of the husband to abuse his wife,[3] and his ordinary temper,[4] are important on the question of his cruelty.

§ 727. **Continued.** — Dr. Lushington, while considering the

v. Otway, 2 Phillim. 95, 1 Eng. Ec. 200; Mayhugh *v.* Mayhugh, 7 B. Monr. 424; Whispell *v.* Whispell, supra; Jelineau *v.* Jelineau, 2 Des. 45; Kirkman *v.* Kirkman, 1 Hag. Con. 409, 4 Eng. Ec. 438; Yule *v.* Yule, 2 Stock. 138; Sharp *v.* Sharp, 2 Sneed, 496; Collins *v.* Collins, 29 Ga. 517; Cartwright *v.* Cartwright, 18 Texas, 626. But see Shaw *v.* Shaw, 17 Conn. 189, 194. In a New Jersey case, the Chancellor observed: "The complainant alleges, that her husband, for the purpose of laying a foundation of a divorce from her, negotiated a plan with one Alexander Dawson, by which he, Dawson, after his wife had gone to bed, was to go in her room, and get into her bed, and then witnesses were to be introduced into the room suddenly, and detect him in that position. If this charge be true, a more base attempt to ruin the character of his wife could not be conceived of, and should for ever absolve her from all further obligations to him." Graecen *v.* Graecen, 1 Green Ch. 459. Indeed, the Texas court seems to regard a charge of adultery by the husband against the wife, if groundless and malicious also, to be sufficient cruelty to authorize the divorce Pinkard *v.* Pinkard, 14 Texas, 356. And see Sheffield *v.* Sheffield, 3 Texas, 79, 84; Atkins *v.* Atkins, post, § 729, note. In a late English case, the judge ordinary, Cresswell, seems to have regarded as of little weight the groundless charge of adultery; but there the husband plainly believed it at the time, and expressed regret for his conduct afterward. Smallwood *v.* Smallwood, 2 Swab. & T. 397. When, in a later case before the English Divorce Court, it appeared that the husband had so conducted toward his wife in the street as to have her taken by a passer-by for a prostitute, — he had, indeed, assaulted her, but no injury was suffered from the assault, — this, as the leading fact in a case of general ill conduct, was accepted as adequate foundation for a divorce. Lord Penzance observed: "A man who has insulted his wife by treating her in the street like a common prostitute is guilty of at least as great an indignity as if he had spat in her face. I can imagine nothing more insulting or shocking to a woman of proper feeling than being so treated. . . . . It is a case of the grossest and most abominable cruelty." Milner *v.* Milner, 4 Swab. & T. 240. In such a case there is, of course, physical danger created; because she may be arrested as a street walker. But the reader cannot fail to see, that, in these cases, the court merely seizes upon a technical and incidental matter to get round the rule which holds mere apprehended mental suffering to be insufficient.

[1] Ante, § 722–725. And see Lewis *v.* Lewis, 5 Misso. 278; Cheatham *v.* Cheatham, 10 Misso. 296.

[2] Dysart *v.* Dysart, 1 Robertson, 106, 117, 121; Whispell *v.* Whispell, supra.

[3] Otway *v.* Otway, 2 Phillim. 95.

[4] Westmeath *v.* Westmeath, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 283, 293.

matter of the admissibility of a wife's libel charging cruelty, after stating the general law of this offence, and observing, that, "in these suits, the species of facts most generally adduced are, first, personal ill-treatment, which is of different kinds, such as blows, or bodily injury of any kind; secondly, threats, of such a description as would reasonably excite, in a mind of ordinary firmness, a fear of personal injury," — added: "When facts of the description to which the court has adverted are admitted to proof, it is perfectly consistent with the principles already mentioned, that minor circumstances should be also admitted; because, on many occasions, they may illustrate other facts; they may afford information of importance, and, where the witnesses do not speak with precision, or where the evidence is not clear, they may influence the amount of alimony (if the suit be successful) to be allotted to the wife. But these circumstances must not be light or trifling; they should be of the same character as the principal charges, though not to the same extent."[1] It should be observed, however, that the learned judge was here considering the allegations which may be introduced into the libel, not the facts provable outside the allegations. For the court may consider and give weight to matters not pleaded, though they cannot be the foundation, or only ground, for the divorce.[2] And in a later case the same learned judge observed: "The whole character and conduct of the parties have been, and ever must be, in all these cases, necessary ingredients in the judgment; without them, the truth can never be sifted, or the just conclusion reached; on a general review must, in some degree, depend the belief of particular occurrences, and the probability of future conduct, if the parties are to live together."[3]

[1] Neeld *v.* Neeld, 4 Hag. Ec. 263, 266. And see C. *v.* C., 28 Eng. L. & Eq. 603, 605; s. c. *nom.* Chesnutt *v.* Chesnutt, 1 Spinks, 196; Gale *v.* Gale, 2 Robertson, 421.

[2] Carpenter *v.* Carpenter, Milward, 159; Whispell *v.* Whispell, 4 Barb. 217.

[3] Dysart *v.* Dysart, 1 Robertson, 106, 141. See also D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, 774, note, 3 Eng. Ec. 329, 331; Reese *v.* Reese, 23 Ala. 785; ante, § 719. In one case, Dr. Lushington complained of the incompleteness of the evidence, as follows: "The evidence affords very little, indeed I may say no information as to the terms on which these parties lived, till shortly before the separation. No relations, who associated with them, are produced; no friends; and only one servant. The court is deprived, in this case, of the advantage it sometimes possesses, of tracing the course

§ 728. **Life, Limb, or Health.** — The physical danger, justifying a divorce, may be danger either to the life or limb, such as of blows, poisoning, or the like;[1] or danger merely to the health.[2] The only qualification required is, that it be sufficient in degree.

§ 729. **Nature of Conduct as importing Danger — Threats — Blows — (Atkins *v.* Atkins, in the Note).** — So the kind of conduct importing danger is immaterial; for whatever tends to the bodily harm of the injured party, and so renders cohabitation unsafe, is legal cruelty.[3] Thus, though the court will not interfere on account of violent, abusive, and insulting language employed by the husband toward his wife, while her personal safety is not endangered;[4] yet, if there are words of menace likely to be carried into effect, they will be sufficient;[5] for "assuredly," says Lord Stowell, "the court is not to wait till the hurt is actually done."[6] There is an early Massachusetts case in which the court is reported to have said: "Threats of violence, without an actual assault, are not a legal cause for divorce. The wife's remedy in such a case is by exhibiting articles of peace against her husband."[7] But many of the

of connubial cohabitation, and so forming a more accurate judgment upon the evidence as to particular facts." Chesnutt *v.* Chesnutt, 1 Spinks, 196, 197; s. c. *nom.* C. *v.* C., 28 Eng. L. & Eq. 603.

[1] Ayl. Parer. 228; Stephens *v.* Totty, Cro. Eliz. 908.

[2] See cases cited, ante, § 717, 719, 722.

[3] Holden *v.* Holden, 1 Hag. Con. 453, 4 Eng. Ec. 452, 454.

[4] See Vignos *v.* Vignos, 15 Ill. 186; Eshbach *v.* Eshbach, 11 Harris, Pa. 343, 345; Richards *v.* Richards, 1 Grant, Pa. 389.

[5] Harris *v.* Harris, 2 Phillim. 111, 1 Eng. Ec. 204; Oliver *v.* Oliver, 1 Hag. Con. 361, 4 Eng. Ec. 429, 430; Beebe *v.* Beebe, 10 Iowa, 133. Dr. Radcliff says: "Words of menace may be merely the language of passion, or they may be the expression of determined malignity, which, if likely to be carried into effect, may warrant the court to interpose to prevent the actual mischief threatened." Carpenter *v.* Carpenter, Milward, 159.

[6] Evans *v.* Evans, ante, § 717, note.

[7] Hill *v.* Hill, 2 Mass. 150. In this same case, "Curia" is also reported to have observed: "In a libel for divorce from bed and board only, you have no occasion to prove a marriage, unless it be denied;" and these two blunders comprise the whole case. The presumption clearly is, that it is not correctly reported. In Warren *v.* Warren, 3 Mass. 321, Parsons, C. J. is reported to have said: "The extreme cruelty of the statute means personal violence, and answers to the *sævitia* of the civil law." By the words "personal violence," he must have intended physical injuries apprehended, as well as actual; for else it would not in any proper sense "answer to the *sævitia* of the civil law." If a wife has exhibited articles of peace against her husband, and he is under bonds to keep the peace, she may still proceed against him for a divorce. So likewise she may, though she has been living for a considerable time separate from him. Hulme *v.* Hulme, 2 Add. Ec. 27, 2 Eng. Ec. 208.

early Massachusetts decisions are loosely reported; and we can hardly presume the court, in this one, intended to lay down a rule in opposition to the concurrent judicial opinion of the entire world besides. Or, if it did so intend, the observation is but little more than dictum; and, if so interpreted, it is not now law in Massachusetts.[1]

[1] Bailey *v.* Bailey, 97 Mass. 373. The case of Atkins *v.* Atkins, decided by the Massachusetts Supreme Judicial Court, March T. 1849, shed an earlier light upon this question; and it is important in other aspects. It is not found in the regular reports; but the following emended newspaper report of it is considered, by the learned judge who delivered orally the opinion of the court, to be in substance correct.

"WILDE, J. entered a decree, granting a divorce from bed and board according to the prayer of the wife, substantially upon the following grounds:—

"The facts in this case are briefly these: The parties have been married but a few months; the age of the husband is sixty years, and of the wife only twenty-two, a disparity of years which generally, as in the present instance, leads to unhappiness. After they had lived together some four months, the husband 'took the fancy into his head, without any provocation whatever,' that his wife was unfaithful. He used on various occasions abusive language to her, calling her a 'prostitute,' accusing her of criminal connection with a young man by the name of Wigglesworth; and these calumnies he also asserted to other persons. He also used toward the libellant personal violence on several occasions, shaking his fist in her face, accompanied with the violent language above stated, attempting to drive her out of the house; on one occasion, too, he seized her violently by the arm for the purpose of expulsion.

"I have considered this case very carefully, and, at the suggestion of the counsel for the respondent, I have consulted with my brethren of the bench (except Fletcher, J. who was absent), and they concur in the opinion I am about to pronounce.

"Several English decisions have been cited by the defendant to show, that the above facts would not authorize a divorce. Sir William Scott has said: 'Mere austerity of temper, rudeness of manner, which wound the mental feelings, unless they place the wife in peril of bodily harm, cannot sustain a libel for divorce from bed and board.' Sir John Nicholl says: 'The causes of divorce must be grave and weighty; there must be danger of bodily harm, and reasonable apprehension of personal injury, so as to render cohabitation unsafe; in one word, there must be *sævitia* in a legal sense to substantiate a libel for separation.' Now there are some points of difference between the law of divorce as established in England and in this Commonwealth. For instance, in England adultery is not cause for a divorce from the bond of matrimony; and one witness uncorroborated is not sufficient to establish any fact in evidence. By the old English law, too, and perhaps, by the modern, a husband may chastise his wife for her faults. Chancellor Walworth has well said of such corporeal correction that it is not authorized by the laws of any civilized country: not indeed meaning that England is not civilized, but referring to the anomalous relics of barbarism which cleave to her jurisprudence. I suppose, therefore, that more flagrant instances of abuse would be requisite to sustain a libel for divorce from bed and board in England than in this country. Yet so far as the present case is affected, the law of the two countries is substantially the same. The law does not require many acts of cruelty; one is enough,

§ 730. **Continued. — Need be no Actual Violence.** — What was properly meant by the Massachusetts court in this somewhat doubtful decision, is, that meaningless threats of violence, not intended really to be executed, and not understood by the wife as endangering her personal safety,[1] are insufficient to justify alone a divorce for cruelty. That violence actually executed is not necessary is as firmly established as any principle of law can be, in England,[2] Ireland,[3] Scotland,[4] and our States generally;[5] while in Scotland and continental Europe even less is required.[6] The old common-law illustration of cruelty is an

if it induces the court to think that the wife is in danger of bodily harm. Neither need the wife be wholly without blame. There are several cases of divorce from bed and board in the reports of this court. It has been held, that threats of violence alone, where there is no danger of bodily harm, are insufficient. It has been held, 4 Mass. 587, that, when force and violence have been *once* used, the wife is unsafe. I have decreed a divorce in Middlesex, where the husband accused the wife of adultery and locked her up. In Poor *v.* Poor, 8 N. H. 307, the court say, that profane and abusive language, though not of itself sufficient to sustain a libel for divorce, goes a great way to show the personal insecurity of the wife.

"Such is the state of the law: it is only necessary to apply it to this case. The husband is jealous, he calls the wife a prostitute, and accuses her to others of adultery. All, as it seems, without reason. Wigglesworth, among others, testified that he had very little acquaintance with the wife; that she was a reserved, modest woman. This jealousy brings on paroxysms of passion. All this occurs soon after the marriage. Surely jealousy is one of the strongest passions which can actuate man. No wife would be safe under the accusation of adultery, accompanied by paroxysms of passion and menaces of violence. Besides, in the present case, there is evidence of violence actually used.

"The divorce must be decreed with costs to the libellant.

"The court remarked, that the case could be carried no further by the respondent, having been passed upon by the whole court. Isaac Story, Jr., for the libellant; W. Sohier for the respondent."

[1] Threats of this kind are insufficient. Shell *v.* Shell, 2 Sneed, 716; Breinig *v.* Meitzler, 11 Harris, Pa. 156.

[2] Harris *v.* Harris, Evans *v.* Evans, Oliver *v.* Oliver, and Holden *v.* Holden, cited ante, § 729; D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329; Westmeath *v.* Westmeath, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 270; Kirkman *v.* Kirkman, 1 Hag. Con. 409, 4 Eng. Ec. 438; Holden *v.* Holden, 1 Hag. Con. 453, 4 Eng. Ec. 452, 454; Otway *v.* Otway, 2 Phillim. 95, 1 Eng. Ec. 200; Ayl. Parer. 228; Stephens *v.* Totty, Cro. Eliz. 908; Houliston *v.* Smyth, 2 Car. & P. 22, 29.

[3] Carpenter *v.* Carpenter, Milward, 159.

[4] 1 Fras. Dom. Rel. 454; Maclelland *v.* Fulton, cited Ferg. Consist. Law, 185.

[5] Rhame *v.* Rhame, 1 McCord Ch. 197; Mason *v.* Mason, 1 Edw. Ch. 278; Harratt *v.* Harratt, 7 N. H. 196; Butler *v.* Butler, 1 Parsons, 329; Jelineau *v.* Jelineau, 2 Des. 45; Graecen *v.* Graecen, 1 Green Ch. 459; Breinig *v.* Meitzler, 11 Harris, Pa. 156; Hughes *v.* Hughes, 19 Ala. 307; Beebe *v.* Beebe, 10 Iowa, 133; Caruthers *v.* Caruthers, 13 Iowa, 266.

[6] Ante, § 728.

attempt to poison; "if the husband does by poison, or any other severe usage, lay snares against his wife's life;" [1] where actual violence, of course, is not presumed. And where words of menace are the ground of the suit, they need not appear to have been addressed to or in the presence of the wife; the test is, whether they excite a reasonable apprehension of bodily harm; and Lord Stowell has observed, "They carry with them something of additional strength if they raise apprehension in others, for that shows the wife was not alarmed upon any unreasonable grounds." [2]

§ 731. **Mental Suffering resulting in Bodily Ills.** — We have seen,[3] that, in matter of legal principle, if the harm does not extend beyond the mind to the endangering of the body, but still is of such a nature and is so severe as utterly to disqualify the party from performing the duties enjoined by the marriage, it should properly lay the foundation for a divorce. But as the authorities do not generally sustain this proposition in point of adjudication, the inquiry arises, supposing the harm must be bodily, and remembering how intimately the body sympathizes with the mind, how sorrow of soul often works sickness in the physical nature, and how other passions sometimes deprive the body of its life, — if in a particular case it is shown that the conduct of a party is such as, while addressed only to the mind, results in actual or threatened deprivation of health, is it then sufficient? A statute of Kentucky having authorized the courts to divorce the husband from the wife, "where his treatment of her is so cruel and barbarous and inhuman as actually to endanger her life;" it was held, that a case is not within this statute, unless there is an injury to the body, intended or inflicted, dangerous to life; and that conduct which in its consequences may shorten life by producing a settled melancholy, or any other treatment, however cruel and inhuman, which operates primarily on the mind, is inadequate. The court add: "We cannot with sufficient certainty ascertain the operation of particular acts upon the mind, and then trace the influence of the mind upon the body, in producing disease

[1] Ayl. Parer. 228. And see Stephens *v.* Totty, Cro. Eliz. 908.

[2] D'Aguilar *v.* D'Aguilar, supra; Hollister *v.* Hollister, 6 Barr, 449, 553.

[3] Ante, § 725.

and death, to begin investigations of the kind without positive command by legislative authority." [1]

§ 732. **Continued.** — On the other hand, the Court of Common Pleas of Pennsylvania, in a case much considered, used the following language: "A husband may, by a course of humiliating insults and annoyances, practised in the various forms which ingenious malice could readily devise, eventually destroy the life or health of his wife, although such conduct may be unaccompanied by violence, positive or threatened. Would the wife have no remedy, in such circumstances, under our divorce laws, because actual or threatened personal violence formed no element in such cruelty? The answer to this question seems free from difficulty when the subject is considered with reference to the principles on which the divorce for cruelty is predicated. The courts intervene to dissolve the marriage bond under this head, for the conservation of the life or health of the wife, endangered by the treatment of the husband. The cruelty is judged from its effects; not solely from the means by which those effects are produced. To hold absolutely, that, if a husband avoids positive or threatened personal violence, the wife has no legal protection against any means short of these, which he may resort to, and which may destroy her life or health, is to invite such a system of infliction by the indemnity given the wrongdoer. The more rational application of the doctrine of cruelty is, to consider a course of marital unkindness, with reference to the effect it must necessarily produce on the life or health of the wife; and, if it has been such as to injure either, to regard it as true legal cruelty. This doctrine seems to have been in the view of Sir H. Jenner Fust, in Dysart *v.* Dysart,[2] where he states, as his deduction from what Sir William Scott ruled in Evans *v.* Evans,[3] that, 'if austerity of temper, petulance of manner, rudeness of language, a want of civil attention, occasional sallies of passion, *do threaten bodily harm, they amount to legal cruelty.*'[4] This idea, expressed axiomatically, would be no less than the assertion of this prin-

[1] Thornberry *v.* Thornberry, 2 J. J. Mar. 322.

[2] Dysart *v.* Dysart, 11 Jur. 490, 492.

[3] Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 311; ante, § 717, note.

[4] This observation, which is found in the Jurist report, does not occur in the report of the case by Robertson, vol. 1, p. 470, 473, et seq.; an omission, doubtless, of the latter reporter.

ciple: that, whatever form marital ill-treatment assumes, if a continuity of it involves the life or health of the wife, it is legal cruelty."[1] In an English case, ill-nature, violent passion, and frequent abuse of the wife from the time of the marriage were proved against the husband; he had so frightened her as to occasion several fits of illness; he had refused her medical assistance; in short, he had been a bad husband, but he had not beaten her. Several instances of adultery were proved; but the facts were held to constitute cruelty also, and a divorce was pronounced on both grounds.[2] Yet, in a still later English case, Dr. Lushington strongly expressed the opinion, that abuse which operates on the mind, and thus produces ill-health, is not legal cruelty.[3]

§ 733. **Continued.** — On this point, also, if we examine it in the light of principle, we shall be led distinctly to the conclusion that the conduct under consideration may be legal cruelty. Suppose the body is the only thing to be considered in these cases, yet, if we find various avenues to it, through any one of which may run the waters to drown its life or health, surely we cannot say, that the approaches through one avenue shall be left open by the law, while the others are closed. In point of proof, it may be difficult in some instances to satisfy the judge or jury affirmatively that bodily danger does exist from the approaches through the avenue of the mind; and, where a woman cannot make out her case, she must suffer the consequences of her failure; yet this could furnish no good reason why her prayer for relief should be denied when the conclusion of fact was evident beyond dispute.

§ 733 *a*. **Continued.** — Since the foregoing discussions originally appeared in these volumes, the question is believed to have been definitively settled in favor of the views here maintained. The latest of a series of cases turning on this point arose in England. The wife of a clergyman sued her husband for a judicial separation on the ground of cruelty, and it was not pretended that any sort of physical violence was likely to result to her from a continuance of the cohabitation; but a

[1] Butler *v.* Butler, 1 Parsons, 329, 334, opinion by King, President J.

[2] Robinson *v.* Robinson, cited 2 Phillim. 96.

[3] Chesnutt *v.* Chesnutt, 1 Spinks, 196, 198; s. c. *nom.* C. *v.* C., 28 Eng. L. & Eq. 603, 605; ante, § 722, note.

constant and severe course of what the defendant deemed to be affectionate discipline, of a moral sort, in connection with an assertion of extreme rights of command and control, had impaired her health, rendering it indeed necessary for her physical well being to separate from him. The judge ordinary granted her prayer for a judicial separation, and the full Divorce Court on appeal confirmed the decision. Said Lord Penzance, the judge ordinary: "Without disparaging the just and paramount authority of a husband, it may be safely asserted that a wife is not a domestic slave, to be driven at all cost, short of personal violence, into compliance with her husband's demands. And if force, whether physical or moral, is systematically exerted for this purpose, in such a manner, to such a degree, and during such length of time, as to break down her health and render serious malady imminent, the interference of the law cannot be justly withheld by any court which affects to have charge of the wife's personal safety." When the case went before the full court, Channell, B., observed: "The most frequent form of ill-usage which amounts to cruelty is that of personal violence, but the courts have never limited their jurisdiction to such cases alone. . . . . We think that the judgment appealed against is in conformity with the law as previously laid down." And Lord Penzance, recurring to the facts of this particular case, and the relative positions of the husband and wife with regard to them, observed: "He says that he does not desire to injure her, and it has never been asserted that he does. But still she has nothing to hope, for Mr. Kelly is acting in the discharge of a religious duty. To any feelings of commiseration for his wife's sufferings, which may at last spring up, it will be his duty not to yield. He is obeying, so he told the court, a higher law; and he protested against this court interfering with his proceedings, whatever their result, inasmuch as he is acting in discharge of a manifest duty." Therefore the interposition of the court in behalf of the wife became necessary.[1]

§ 733 *b*. **Continued.** — In our own country the case which, if the facts had been such as to render the language of the court in the fullest sense adjudication, and not somewhat bordering,

[1] Kelly *v.* Kelly, Law Rep. 2 P. & M. 31, 32; on appeal, 59, 61, 62, 72, 73.

as it is, upon mere dictum, might be deemed of the highest interest, is a Massachusetts one. In it, the doctrine was laid down by Chapman, J., as follows: "Upon consideration of the whole subject, a majority of the court are of opinion, that, where a divorce is sought on the ground of cruelty, whether it be cruel and abusive treatment, or cruelty in neglecting or refusing to provide suitable maintenance for the wife, a reasonable construction of the statute requires that it shall appear to be, at least, such cruelty as shall cause injury to life, limb, or health, or create a danger of such injury, or a reasonable apprehension of such danger upon the parties continuing to live together. This is broad enough to include mere words, if they create a reasonable apprehension of personal violence, tend to wound the feelings to such a degree as to affect the health of the party, or create a reasonable apprehension that it may be affected." The learned judge proceeds to what, if it were before the minds of all judges and juries when considering cases of this sort, would lead us to be reconciled to the rule of law which prevents the mere infliction of mental suffering from constituting a ground of divorce. He said: "If it be supposed that this interpretation of the statute does not sufficiently provide for a class of cases where, though the abusive language or conduct of one party does not affect the health of the other, yet it makes the life of the other so wretched and intolerable that a divorce ought to be granted on account of the cruelty, we think such supposed cases cannot exist. For deeply wounded sensibility and wretchedness of mind can hardly fail to affect the health. And where there is not this evidence of injured feeling, we can see no ground for granting a divorce that is not uncertain and dangerous, and that would not authorize divorces for slighter causes than the legislature apparently contemplated."[1] In a California case, "it appears," said Cope, C. J., "that the defendant was in the habit of using toward the plaintiff the vilest and most abusive language, falsely charging her with adulterous intercourse; that she is a weak, nervous woman, modest in her deportment, and amiable in her disposition; that the conduct of the defendant caused her much mental suffering, producing fits of illness, and

[1] Bailey *v.* Bailey, 97 Mass. 373, 380, 381.

threatening permanent injury to her health, rendering a separation from him necessary." Thereupon a divorce was granted her, while still the court adhered to the doctrine, that, to be a ground of divorce, the suffering which the wrong-doer inflicts on the mind must cast its effects on the body.[1]

§ 734. **Motives, &c.** — In determining whether or not the conduct of the husband sufficiently imports bodily harm, we are not to look solely at the motive whence it proceeds. "It may be from turbulent passion, or sometimes from causes which are not inconsistent with affection,[2] and are indeed often connected with it; as the passion of jealousy.[3] If bitter waters are flowing, it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his control, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated."[4] Thus, while the mere act of drunkenness, however often repeated, is not cruelty,[5] yet violent and outrageous conduct of a husband, when drunk, toward his wife, endangering her safety, is, though perfectly consistent with affection during his sober moments.[6] And in Westmeath *v.* Westmeath, where Sir John Nicholl

[1] Powelson *v.* Powelson, 22 Cal. 358. And see Cole *v.* Cole, 23 Iowa, 433; Gholston *v.* Gholston, 31 Ga. 625.

[2] See Westmeath *v.* Westmeath, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238.

[3] "Jealousy is a passion producing effects as violent as any other passion, and there will be the same necessity to provide for the safety and comfort of the individual. If that safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone." Lord Stowell, in Kirkman *v.* Kirkman, 1 Hag. Con. 409, 4 Eng. Ec. 438.

[4] Lord Stowell, in Holden *v.* Holden, 1 Hag. Con. 453, 4 Eng. Ec. 452, 454. "If I were satisfied, that conduct dangerous in itself arose from morbid feelings out of the control of the [defendant] husband, I must act, if the danger exist." Dr. Lushington, in Dysart *v.* Dysart, 1 Robertson, 106, 116.

[5] Waskam *v.* Waskam, 31 Missis. 154; Hudson *v.* Hudson, 3 Swab. & T. 314; Brown *v.* Brown, Law Rep. 1 P. & M. 46. In a Texas case, however, Hemphill, C. J. observed: "Such drunkenness as totally or in a great degree disqualified the husband to discharge his marital duties or obligations, — such, for instance, as would compel the wife, as in this instance to leave the husband, — would be a degree of cruelty in itself, and which, if continued for a length of time, say three years in analogy to the time prescribed by the statute for abandonment, would amount in law to a cause for divorce." Camp *v.* Camp, 18 Texas, 528.

[6] Lockridge *v.* Lockridge, 3 Dana, 28; Mason *v.* Mason, 1 Edw. Ch. 278; Boggess *v.* Boggess, 4 Dana, 307; Hughes *v.* Hughes, 19 Ala. 307; Bowic *v.* Bowic, 3 Md. Ch. 51; Marsh *v.* Marsh, 1 Swab. & T. 312; Power *v.* Power, 4 Swab. & T. 173.

granted the divorce, he observed: "The cruelty imputed is not that of cold malignity, or savage, continual, unfeeling brutality of disposition; it is not that of satiated possession, producing disgust and hatred; the acts charged are not inconsistent with occasional kindness, with the existence and continuance of strong attachment, nay, even with violent affection; but the main features of the alleged cruelty are great irritability of temper, producing ungovernable passion, ending occasionally in acts of personal violence, and, of course, attended with the danger of a repetition of personal mischief."[1] But a mere unintentional act, though occasioning pain and injury, will not warrant a sentence of divorce; because it does not imply future risk.[2] So, violence inflicted in a mutual contest is no cause for the interference of the court;[3] but here is involved also another principle, to be presently discussed; namely, that the complaining party must be without great blame.

§ 734 *a*. **Continued — Insanity — Effects of other Disease.** — It is plain that a husband, for example, may be insane; then, if the wife's safety is endangered, she has another method of protecting herself than by proceedings for a divorce, and these she could not maintain. Still there may be a settled state of mind produced by disease which, while it is not insanity, is of a sort to render the wife unsafe; in which case, it has been intimated, she will be entitled to a divorce. "If," said the judge ordinary, Cresswell, J., in one case, "an act of violence were committed under the influence of an acute disorder, such as brain fever, and it were made clear that, the disorder having been subdued, there was no danger of a recurrence of such acts, the case would be different. But, if the result of such a disease has been a new condition of the brain, ren-

[1] Westmeath *v.* Westmeath, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 272. In Shaw *v.* Shaw, 17 Conn. 189, 195, it is observed, that the doctrine of the immateriality of the motive applies to "cases of violence where the natural consequence would be injurious or dangerous, and where the act therefore was unlawful;" but not where the act is itself lawful, and under ordinary circumstances not hurtful.

[2] Neeld *v.* Neeld, 4 Hag. Ec. 263, 270. In Oliver *v.* Oliver, 1 Hag. Con. 361, 4 Eng. Ec. 429, 433, 434, the wife refused to deliver up to her husband some keys, to the possession of which he was entitled, and he undertook to take them from her. In the scuffle, she went against the wall, and bruised her arm and breast. It was held not to be sufficient cause for a divorce.

[3] Rumball *v.* Rumball, Poynter Mar. & Div. 237, note; Dysart *v.* Dysart, 1 Robertson, 106, 123.

dering the party liable to fits of ungovernable passion which would be dangerous to a wife, then undoubtedly this court is bound to emancipate her from such peril." [1]

§ 735. **Kind of Violence.** — The kind of violence, where violence is used, is immaterial. In this respect, no difference exists between a blow, a push, or any other force.[2] So, it is cruelty in a husband to confine his wife; or knowingly to deprive her of needful air;[3] or to starve her; or, having the means, to refuse her what are termed the necessaries, not the mere luxuries, of life;[4] or to withhold medical assistance in sickness, while he is able to provide it;[5] or knowingly to communicate venereal disease to her, though there must be clear evidence he meant its communication.[6] Yet, on the latter point, the presumption is, that the husband knew his own state of health and the probable result of the connection.[7] It is not legal cruelty for a man to marry while venereal disease is on him, and thereby endanger his wife, if in fact it is not taken by her.[8] This last point, however, may be a little doubtful, viewed otherwise than as one of evidence; for, if really there is danger, the wife should not be compelled to cohabit; yet, if the marriage was without apprehension in the husband's mind, and if on learning the danger he should forbear to do what might communicate the disease, plainly, in principle, no divorce should be granted. In like manner, the wilful communication of the itch is an act of cruelty, though perhaps not sufficient alone.[9] A husband's attempt, when infected with

[1] Curtis *v.* Curtis, 1 Swab. & T. 192, 213.

[2] Dysart *v.* Dysart, 1 Robertson, 106, 125; Saunders *v.* Saunders, 1 Robertson, 549, 560.

[3] Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 326, 327.

[4] Butler *v.* Butler, 1 Parsons, 329; Smedley *v.* Smedley, 30 Ala. 714. And see Evans *v.* Evans, supra, 4 Eng. Ec. 350, 351.

[5] Evans *v.* Evans, supra, 4 Eng. Ec. 351. "The denial of necessaries and comforts, even of medical assistance, where there are no pecuniary resources, never can be construed into acts of cruelty; but no one could, I think, entertain a reasonable doubt, that such a denial, when the fortune was ample, might probably, under circumstances, be considered differently." Dr. Lushington, in Dysart *v.* Dysart, 1 Robertson, 106, 111.

[6] Collett *v.* Collett, 1 Curt. Ec. 678; Long *v.* Long, 2 Hawks, 189.

[7] Brown *v.* Brown, Law Rep. 1 P. & M. 46; Boardman *v.* Boardman, Law Rep. 1 P. & M. 233.

[8] Ciocci *v.* Ciocci, 26 Eng. L. & Eq. 604, 1 Spinks, 121.

[9] C. *v.* C., 28 Eng. L. & Eq. 603, 606; s. c. *nom.* Chesnutt *v.* Chesnutt, 1 Spinks, 196.

venereal disease, to force his wife to his bed, has been said to be of a mixed nature, partly cruelty, partly evidence of adultery. If he undertakes to debauch his own woman servant, it is an act of cruelty, "perhaps," observes Lord Stowell, "not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage on his wife's feelings. The attempt to make a brothel of his own house was brutal conduct, of which the wife had a right to complain." [1]

§ 736. **Ill-treatment of Wife's Child — Other Relations.** — And where a husband, for the purpose of harassing his wife, ill treats a child [2] or other relative of hers,[3] this is cruelty to her, though perhaps not alone sufficient. Dr. Lushington says: "An act of cruelty on the part of a father to a daughter is not necessarily cruelty towards the mother; although it may amount, in certain circumstances, in the eye of the law, to such. The father may be guilty of the greatest cruelty to his children, and yet be guiltless in respect to his wife; or he may be guilty of far less cruelty to his children, and this less degree of cruelty in regard to the children will make him criminal towards his wife." The test seems to be, whether the cruelty was practised on the child for the purpose of annoying the mother.[4] And the circumstance that the cruelty was in the presence of the mother has been deemed important, if indeed it is not the test as to its admission.[5]

§ 737. **Damaging Property.** — There is a case in which, the husband being complainant against the wife for her cruelty, he pleaded, "that she had damaged a valuable grand piano-forte by striking it repeatedly upon the keys;" and the court rejected the allegation, observing, "that such conduct might not unfairly be considered as cruelty to her husband, being a

[1] Popkin *v.* Popkin, 1 Hag. Ec. 765, note, 3 Eng. Ec. 325. And see Cartwright *v.* Cartwright, 18 Texas, 626.

[2] Bramwell *v.* Bramwell, 3 Hag. Ec. 618, 5 Eng. Ec. 232, 242. See C. *v.* C., 28 Eng. L. & Eq. 603, 608; Mayhew *v.* Thayer, 8 Gray, 172; Everton *v.* Everton, 5 Jones, N. C. 202.

[3] Saunders *v.* Saunders, 10 Jur. 143.

[4] Wallscourt *v.* Wallscourt, 11 Jur. 134; Perry *v.* Perry, 1 Barb. Ch. 516. In Tourné *v.* Tourné, 9 La. 452, it was held, that the father's partial treatment of one of the children, and the child's disobedience toward the mother, supposed to result from his encouragement, are not sufficient ground for a separation.

[5] Suggate *v.* Suggate, 1 Swab. & T. 489. See Everton *v.* Everton, supra.

wanton abuse of his property; but that it did not think it quite sufficient to plead a single act of that kind, done in a moment of passion."[1] In a wife's suit, Dr. Lushington declined to receive her allegation, that her brother gave her a favorite pony, suitable for her to drive, she having been recommended to drive out for her health; but that her husband, to annoy her, himself drove the pony, though he had horses of his own standing idle, until he spoiled the animal from bad treatment; then gave it, together with £10 her mother had made her a present of, in exchange for another pony; and, lastly, sold this pony, and pocketed the money, and forbade her the use of his own horses. The judge observed, that, "if any fact were proved, it could have no effect upon the court, which can never attend to quarrels of this sort."[2]

§ 738. **Desertion as Cruelty — Refusing Marital Connection.** — Wilful and malicious desertion is not alone cruelty; but it may be noticed in aggravation of acts of cruelty, and "in conjunction with other acts it frequently is" sufficient.[3] *A fortiori*, it is not cruelty for the husband to take a separate bed.[4] And in general terms it appears to be regarded not as cruelty for either spouse to withhold from the other marital connection.[5] But this doctrine, to be sound, as applied to cases where no good reason, such as the health of the party refusing, prompts the refusal, must proceed on the assumption that the health of the other party is not injured thereby. Now, in many cases of impotence in the man, perhaps in most, it appears in evidence that the health of the woman has suffered from being obliged to sleep with a male person without any proper gratification of passions which are thereby excited. And there can be no doubt that a capable person, whether man or woman, may in this way inflict an injury to the health

[1] Kirkman *v.* Kirkman, 1 Hag. Con. 409. And see White *v.* White, 1 Swab. & T. 591.

[2] Saunders *v.* Saunders, 10 Jur. 143, 144. See also D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, note, 3 Eng. Ec. 329, 331. See ante, § 726, 727; post, § 740.

[3] Evans *v.* Evans, 1 Hag. Con. 35, 120, 4 Eng. Ec. 310, 349; Sullivan *v.* Sullivan, 2 Add. Ec. 299, 2 Eng. Ec. 354; Severn *v.* Severn, 3 Grant, U. C. Ch. 431; Cartwright *v.* Cartwright, 18 Texas, 626; ante, § 726.

[4] D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, 774, note, 3 Eng. Ec. 329, 331; Orme *v.* Orme, 2 Add. Ec. 382, 2 Eng. Ec. 354.

[5] Cousen *v.* Cousen, 4 Swab. & T. 164; Cutler *v.* Cutler, 2 Brews. 511.

of the other party to the marriage on account of which a divorce for the cruelty ought to be granted. In Scotland, the *positive* wrong of turning a wife out of doors authorizes a judicial separation for cruelty; but, concerning the mere *negative* injury of deserting her, the Scotch law appears not to be settled, though Erskine deems even this sufficient.[1]

§ 739. **Sodomy.** — Unnatural practices, termed in the criminal law sodomy, buggery, &c.,[2] are by the unwritten law of England ground of divorce from bed and board. The reason why they are, does not fully appear in the reports; they may perhaps be deemed a species of adultery; probably they are to be looked upon as approaching quite as near to the legal cruelty. And a mere unsuccessful attempt at such practices is sufficient, though an attempt to commit adultery is not. Where a wife pleaded general ill-treatment in one article of her libel; and pleaded in another article a conviction of her husband in a criminal court for assaulting his apprentice lad, and lewdly, wantonly, and wickedly pressing, &c., this lad, and endeavoring to persuade him to permit indecent liberties with his person; Sir John Nicholl admitted the libel, and afterward granted the divorce. He observed: "The case laid, as a whole, does amount, in my judgment, to that *per quod consortium amittitur*. Could the court send the wife home to such a husband? He refuses her access to his person, — he resorts to abominable practices, *cruelty itself, independent of that other charged.*"[3] In another case, an allegation was admitted, responsive to the husband's suit for the restitution of conjugal rights, charging him with unnatural practices toward his wife. On the hearing, the evidence upon this allegation failed.[4] That such practices are deemed in England to be a heavier offence against the marriage than even adultery, appears from Stat. 20 & 21 Vict. c. 85, § 27,[5] which, while

[1] 1 Fras. Dom. Rel. 458. See also Jones *v.* Jones, Wright, 155.

[2] See 1 Bishop Crim. Law, § 380; 2 ib. § 1027 et seq.

[3] Mogg *v.* Mogg, 2 Add. Ec. 292, 2 Eng. Ec. 311. See also Bromley *v.* Bromley, and Ellenthorpe *v.* Myers, 2 Add. Ec. 158, note, 2 Eng. Ec. 260, 261.

[4] Geils *v.* Geils, 6 Notes Cas. 101. The wife pleaded, that "she suffered, or submitted to, such treatment." "Tenendam est sodomiam sufficere ad divortium. Quia sodomia est gravius delictum adulterio. Si ergo ob adulterium permittitur divortium; idem à fortiori dicendum erit de sodomia." Sanchez, lib. 10, disp. 4, § 3.

[5] See ante, § 65, note.

allowing to the wife a divorce *a vinculo* from her husband for his adultery, only when committed under aggravated circumstances, or coupled with cruelty or desertion, permits this divorce to her in all cases of his "sodomy or bestiality." In the United States, there are no statutes, except in a State or two,[1] in terms making this sort of conduct an offence against the marriage. Whether its commission would be deemed to be either cruelty or adultery with us, is a question undecided.

§ 740. **Amount of Cruelty — Extent of Danger.** — The amount of cruel treatment, or the extent of danger to the life, limb, or health, authorizing a divorce for cruelty, is a question often discussed, but its solution depends on a variety of circumstances and considerations. Chancellor Kent observes: "Though a personal assault and battery, or a just apprehension of bodily hurt, may be ground for this species of divorce, yet it must be obvious to every man of reflection, that much caution and discrimination ought to be used on this subject. The slightest assault or touch, in anger, would not surely, in ordinary cases, justify such a grave and momentous decision. Pothier says,[2] that a blow or stroke of the hand would not be a cause for separation under all circumstances, unless it was often repeated. The judge, he says, ought to consider, if it was for no cause or for a trivial one, that the husband was led to this excess; or if it was the result of provoking language on the part of the wife, pushing his patience to extremity. He ought to consider, whether the violence was a solitary instance, and the parties had previously lived in harmony. All these circumstances will, no doubt, have due weight in regulating the judgment of the court." [3]

§ 741. **Continued.** — Sir John Nicholl observes: "What must be the extent of injury, or what will reasonably excite the apprehension, will depend upon the circumstances of each case. So, likewise, what may aggravate the character of ill-treatment must be deduced from various considerations, — in some degree from the station of the parties, in some degree from the condi-

[1] Ante, § 191 *a*, note.

[2] Traité du Contract de Mariage, § 509.

[3] Barrere *v.* Barrere, 4 Johns. Ch. 187.

tion of the person suffering at the time of the infliction. The complexion of individual acts may be heightened ; nay, the acts may almost change their very essence, by the accompaniments. Not only particular stations and situations, and the feelings almost necessarily arising out of them, but even acquired feelings, may be entitled to some attention. In Evans *v.* Evans,[1] Lord Stowell's remarks establish, that what wounds, not the natural, but the acquired feelings, will not absolutely be excluded by the court, when stated merely as a matter of aggravation. *A fortiori*, then, feelings which naturally belong to a wife or to a mother of every station constitute a part of the consideration. . . . . A blow between parties in the lower conditions and in the highest stations of life, bears a very different aspect. Among the lower classes, blows sometimes pass between married couples, who, in the main, are very happy and have no desire to part ; amidst very coarse habits, such incidents occur almost as freely as rude or reproachful words ; a word and a blow go together. Still, even among the very lowest classes, there is generally a feeling of something unmanly in striking a woman ; but if a gentleman, a person of education, the discipline of which *emollit mores*, and tends to extinguish ferocity, if a nobleman of high rank and ancient family, uses personal violence to his wife, his equal in rank, the choice of his affection, the friend of his bosom, the mother of his offspring, — such conduct, in such a person, carries with it something so degrading to the husband, and so insulting and mortifying to the wife, as to render the injury itself far more severe and insupportable. The particular situation of the parties when the ill-treatment is inflicted may create a still further aggravation." [2] Thus, the husband's cruelty is aggravated by the woman's being in pregnancy.[3] So, also, by her being of advanced age ; for " there may be relative cruelty, and what is tolerable by one may not be by another." [4]

[1] Evans *v.* Evans, 1 Hag. Con. 35, 38, 4 Eng. Ec. 310, 311.

[2] Westmeath *v.* Westmeath, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 271. And see David *v.* David, 27 Ala. 222.

[3] Westmeath *v.* Westmeath, supra, 4 Eng. Ec. 294 ; Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 330 ; Fleytas *v.* Pigneguy, 9 La. 419. See Dysart *v.* Dysart, 1 Robertson, 106, 109.

[4] D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 335.

§ 742. **Rank and Condition.** — We have seen,[1] that, in matter of just principle, regard should be had to the peculiar mental and physical constitution, and the particular state of health of the party. These, it is deemed by the writer, should be more carefully looked at than mere rank and condition; though, to the latter, some, but not an overwhelming, weight should be given. In a New York case, where the husband was the party proceeded against, Parker, J., observed: "It is said, his grossly indecent language, spoken to and of his wife, is to find palliation if not excuse in the fact that the parties moved in a circle of life less refined than others who have enjoyed the advantages of a more cultivated society. But I deny the application of the rule to a case like this. The *decencies* of life belong equally to all classes; and in none are they more carefully cultivated, and more faithfully observed, than among the respectable farmers of our country. The human heart is the same in every grade of society. From it flows, in the humblest as well as highest walk of life, the same current of affection that surrounds the domestic hearth with gentle conduct and kind influences. Delicacy of feeling belongs as well to the cottage as to the statelier mansion. The mind may be cultivated by study, and the manners polished by refined association; but the natural affections of the heart are rarely improved by contact with the world. In their native purity they recoil at any exhibition of indecency either in word or deed. Want of cultivation may excuse an unrefined, or even coarse expression; but it forms not the slightest apology for indecent conduct, or obscene language."[2]

§ 743. **Cause Weighty. — Slight Battery.** — The causes of complaint must be grave and weighty.[3] "Mere turbulence of temper, petulance of manners, infirmity of body or mind, are not numbered amongst those causes. When they occur, their effects are to be subdued by management, if possible, or submitted to with patience; for the engagement was to *take for better, for worse;* and, painful as the performance of this duty may be, painful as it certainly is in many instances, which exhibit a great deal of the misery that clouds human life, it must

[1] Ante, § 717, note.
[2] Whispell *v.* Whispell, 4 Barb. 217.
[3] Mason *v.* Mason, 1 Edw. Ch. 278; Coles *v.* Coles, 2 Md. Ch. 341; Schindel *v.* Schindel, 12 Md. 294; ante, § 719.

be attempted to be sweetened by the consciousness of its being a duty, and a duty of the very first class and importance."[1] And it is not every slight touching of the person of the wife by the husband, even in anger, which will authorize a divorce.[2]

§ 744. **Continued — Limit of the Doctrine — A Single Act.** — On the other hand, the case need not be an aggravated one of constant, deliberate, and brutal ill-usage. Thus, in one instance the court below charged the jury as follows: "The acts must be persistent, and the cruelty must be so extreme in its nature that in itself it furnishes an apprehension that the continuance of the cohabitation would be attended with bodily harm to the wife." But, on review before the higher tribunal, this ruling was held to be wrong. Said the judge: "This charge, we think, was too strong. Acts of cruelty, such as are specified, need not be persistent, need not become a fixed habit, before relief and safety can be had by a divorce."[3] If, from irritability of temper, the husband has occasionally lost command over himself, and, under the sway of passion, has done acts of violence toward his wife, under circumstances leading to the presumption that they will be repeated, though seldom, the divorce may be granted.[4] Said Lord Stowell: "The law does not require that there should be many acts. The court has expressed an indisposition to interfere on account of one slight act, particularly between persons who have been under long cohabitation; because, if only one such instance of ill-treatment, and that of a slight kind, occurs in many years, it may be hoped and presumed that it will not be repeated.[5] But it is only on this supposition that the court forbears to interpose its protection, even in the case of a single act; because, if one act should be of that description which should induce

[1] Lord Stowell, in Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 349; s. p. Turbitt *v.* Turbitt, 21 Ill. 438; Everton *v.* Everton, 5 Jones, N. C. 202.

[2] Richards *v.* Richards, 1 Grant, Pa. 389.

[3] Mahone *v.* Mahone, 19 Cal. 626, 628, opinion by Norton, J.

[4] Lockwood *v.* Lockwood, 2 Curt. Ec. 281, 7 Eng. Ec. 114, 125; Dysart *v.* Dysart, 1 Robertson, 106, 121, 470, 533, 540.

[5] s. p. Fleytas *v.* Pigneguy, 9 La. 419. In Graecen *v.* Graecen, 1 Green Ch. 459, the Chancellor was of opinion, that isolated acts of long standing should not entitle the wife to a divorce, especially if the later conduct of the husband has been of a different character; yet evidence of the earlier acts may be received in connection with evidence of more recent ones, to show a series of wrongs and injuries.

the court to think that it is likely to occur again, and to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorize its interference." [1]

§ 745. **A Single Act, continued.** — Indeed, that a single act of violence may, under some circumstances, be sufficient to authorize a divorce, is a proposition which necessarily flows from the doctrine already considered,[2] that no violence whatever need be really inflicted, provided the conduct of the husband is such, in any respect, as to create a reasonable apprehension of future violence. Yet, in a Pennsylvania case, under a statute which, perhaps, altered the common-law rule in this respect, the doctrine seems to be laid down, that one act is not alone enough. The statute provided for a divorce in favor of the wife, whenever her husband shall have "offered such indignities to her person as to render her condition intolerable and life burdensome, and thereby forced her to withdraw from his house and family." The court observed: "We had this cause here three years ago, and we then reversed a decree in favor of the wife, because on the trial the judge below had instructed the jury, that, if the husband in anger and madness twisted his wife's nose, she was entitled to a verdict." And in considering the instructions which were actually given below, the learned judge who pronounced the opinion of the higher tribunal remarked: "Though the judge [below] speaks of the general conduct of the husband, yet we understand his relevant instruction to be, that, if the pulling of the wife's nose was done in rudeness and in anger, in a coarse, vulgar, and harsh manner, there should be a verdict in her favor. This is substantially the very error that caused the former reversal. . . . . It is not of a single act that the law speaks in the clause under which this case falls; but of such a course of conduct or continued treatment as renders the wife's condition intolerable, and her life burdensome." [3] On referring, however, to the report of the case as decided on the former occasion, we find that the learned judge who pronounced the opinion made use of the

[1] Holden *v.* Holden, 1 Hag. Con. 453, 4 Eng. Ec. 452, 454; French *v.* French, 4 Mass. 587.

[2] Ante, § 730.

[3] Richards *v.* Richards, 1 Wright, Pa. 225, 227, opinion by Lowrie, C. J.

following language: "It is quite possible that a single act of cruelty, on a single occasion, may be so severe, and attended with such corresponding circumstances, as might, under a fair and liberal construction of this statute, justify a divorce." But the particular act, under the particular circumstances shown, was deemed quite properly not to be enough.[1]

§ 745 *a*. **Continued.** — Whatever may be said of this Pennsylvania doctrine, as derived from the statute on which the case was decided, there are in a small number of our States statutes so unfortunately drawn as plainly to compel the court to hold that no one act, whatever its nature and import, is enough. Thus, in Illinois, the words of the statute are "extreme *and repeated* cruelty;" and it is plain that a single act, though it may be "extreme" in point of cruelty, is not also "repeated." Precisely how far a court may properly mollify this unfortunate language by construction, it may not be easy to say in advance. To the writer it seems plain that there need not be what might be termed a *double* cruelty proved; that is, first, such facts as alone would constitute cruelty by our unwritten law; and, secondly, such other and disconnected facts as alone would amount to the same thing; because, in these cases, no one act of the party complained against is to be viewed as an isolated transaction, but each fact is to be viewed as a stick in a bundle which comprises the entire matrimonial life. Therefore if a case should present itself in which a half dozen transactions were relied on, and no one of them would in the English law be sufficient of itself, but together they would just constitute legal cruelty and no more, it seems to the writer that they should be deemed sufficient under this Illinois statute. According to one case decided under this statute, the fact that a husband has repeatedly used harsh and profane language to his wife, and that on one occasion he choked her and threatened to do so again, does not constitute extreme and repeated cruelty. "It is a positive requirement of our statute," said Walker, J., "that there shall be extreme and repeated cruelty, to authorize the courts to dissolve the marriage tie. One act has not, in this State, been held to answer the requirements of the statute. And the uniform construction given to the act by

[1] Richards *v.* Richards, 1 Grant, Pa. 389, 391, opinion by Armstrong, J.

this court, as announced in a number of decided cases, is, that the cruelty must consist in physical violence, and not in angry or abusive epithets, or even in profane language." [1]

§ 746. **Continued.** — There are probably not many cases which ever occurred, wherein one single act of cruelty, and one alone, — committed by a husband in whose general conduct no impropriety is shown, concerning whose general habit and disposition toward his wife there is no proof, — would be properly held to be sufficient to authorize a divorce; [2] for, if the act were exceptional to the entire conduct of the party, it should not ordinarily be deemed to endanger the personal safety of the wife; and, if it were not exceptional, but there were other things in his conduct harmonious with the act, yet not proceeding to the same extreme, the party who relies on the act should show the other things. Still, in a case before the English Court for Divorce and Matrimonial Causes, the wife was granted her prayer for a divorce from the bond of matrimony (there being also adultery in conjunction with the cruelty, as required by the statute), though the parties had never met subsequently to the nuptials, but in the single instance when the cruelty was inflicted. "It has been laid down," said the learned judge ordinary, "that, where one gross act of cruelty is of such a nature as to raise a reasonable apprehension of further acts of the same kind, the court will grant relief." [3] In harmony both with this decision and with the general doctrine, it was held, in a previous case before the same learned judge, that a single act of violence, inflicted by the husband on the wife, not producing any considerable injury to her person, and not repeated, is, though it be an unwarrantable act, insufficient as a foundation for the decree of the court. "That the conduct of the respondent," said this learned person, Sir C. Cresswell, "was unwarrantable, is true; but I have examined the cases referred to, and find in each of them, not merely one violent act committed under excitement, and not producing any considerable injury to the person, but repeated acts, furnishing such evidence of *sævitia* as warranted

[1] Embree *v.* Embree, 53 Ill. 394, 395.

[2] And see Cook *v.* Cook, 3 Stock. 195.

[3] Reeves *v.* Reeves, 3 Swab. & T. 139, 141.

the court in concluding that the wife could not cohabit in safety with such a husband, and was therefore entitled to the protection of the court."[1] And in a Louisiana case, the doctrine was laid down, that it is proper, in considering whether one single act of cruelty, on the part of a husband toward his wife, is sufficient to entitle her to a divorce, to take into consideration the age, habits, and modes of life of the parties.[2]

§ 747. **Principle governing the Cases — "All the Circumstances."** — The foregoing propositions are but deductions from the general one, that the divorce for cruelty is allowed rather to prevent danger apprehended than to punish what is already done.[3] Thence it follows, also, that "all the circumstances together must be taken into consideration; for the question is not, whether this or that fact alleged would render it the duty of the court to pronounce for a separation, but whether all the facts combined ought to lead to that result."[4]

§ 748. **Specific Enumerations.** — An assault or stroke, a slap or slaps with the hand, in a single instance; occasional petulance of temper, rudeness of language, sallies of passion, *not threatening bodily harm*, or endangering health or safety; have been considered insufficient.[5] So, where a husband and wife lived unhappily together, and sometimes cursed each other with the tongue; and the husband once went so far as to push the wife out of doors, without harming her, in a mutual quarrel,[6] the evidence not showing which of the parties was to blame, — her prayer for divorce was refused.[7] But throwing a bucket of water on the wife's head, with the threat of further violence if she did not leave the house, was held to be a sufficient act of cruelty, in a case where there was general unkindness of deportment and language.[8] So is spitting in the wife's face a gross act of cruelty; and it seems to be sufficient of itself, though this is not quite clear.[9] No doubt,

[1] Smallwood *v.* Smallwood, 2 Swab. & T. 397, 402.

[2] Lauber *v.* Mast, 15 La. An. 593. And see Doyle *v.* Doyle, 26 Misso. 545.

[3] Ante, § 719.

[4] Dr. Lushington, in Saunders *v.* Saunders, 1 Robertson, 549, 556.

[5] Finley *v.* Finley, 9 Dana, 52.

[6] Ante, § 734.

[7] Cooper *v.* Cooper, 10 La. 249.

[8] Moyler *v.* Moyler, 11 Ala. 620.

[9] Cloborn's Case, Hetley, 149; D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, 777, 3 Eng. Ec. 329, 331; Saunders *v.* Saunders, 1 Robertson, 549, 561.

like all other acts, it receives color from the general temper of the parties, and the circumstances under which it is inflicted.

§ 749. **Continued.** — Sir John Nicholl, in one case, observed: "Cruelty, in my judgment, is proved. Here is violence, preceded by deliberate insult and injury. The sending away her, [the wife's] horses, and putting them up to sale, while she was at church [they were her separate property]; the forcibly carrying her and confining her to her room; afterwards attempting forcibly to carry her back to her place of confinement; the forming an adulterous connection with her maid; the keeping that servant in the house, notwithstanding the remonstrances of his wife and her friends; the deposing his wife from the management of his family, and vesting it in this prostitute, — such circumstances have always been held by the court, not merely as acts of adultery, but as connected with cruelty. In addition to this, there is his conduct respecting the child [whom he took from her and compelled to sleep in the room with himself and the prostitute], notwithstanding the pretext of parental rights, the exercise of which courts of justice will not be disposed to scan too nicely; yet here it was done, as has been shown, merely to distress his wife, — this is marital tyranny, — it is as clear an act of deliberate and unmanly cruelty as can be committed."[1]

§ 750. **Continued.** — In a Tennessee case, the court, on granting a divorce to the wife, described the conduct of the husband thus: "He is in the habit of using language to her which a gentleman will not employ to his slave; he threatens to drive her from his house; he slaps her, and, at the family altar, in her presence, he prays God to deliver him from her." The parties were both members of the Methodist Episcopal Church; and the prayer the defendant admitted and justified as being right. The court regarded it, if intended only for her ear, as the greatest abuse of all; but, if it were serious, there was danger that his hands would execute what his heart desired.[2]

[1] Smith *v.* Smith, 2 Phillim. 207, 1 Eng. Ec. 232, 234.

[2] Payne *v.* Payne, 4 Humph. 500. See also Clutch *v.* Clutch, Saxton, 474. In Jones *v.* Jones, Wright, 244, and Beatty *v.* Beatty, Wright, 557, the facts

§ 751. **Continued.** — In Mississippi, the divorce for cruelty is from bed and board only; while, for adultery and desertion, it is from the bond of matrimony.[1] There, on a bill by the wife, praying for the divorce from bed and board, no evidence was produced of any threats or blows, but only of the husband's dislike of her; he was a wicked and abandoned creature; he married her for her money, and, after getting it, deserted her, and lived in adultery with another woman. She was miserably clad when he turned her off, and he neglected to provide for her afterward. The divorce was granted in accordance with her prayer.[2]

§ 752. "**Endanger Life.**" — The statute of Iowa provides for a divorce when the husband "is guilty of such inhuman treatment as to endanger the life of his wife." And the court observes, that, "as a specific cause of divorce, this clause is the definition of that degree of cruelty which in this State entitles the party to a divorce." The danger, it is to be noticed, must be more than of mere bodily harm, it must be danger to "the life of the wife." Yet, to create this danger, there need not be actual violence, "but threats of violence," said the learned judge, "where there is danger of harm, — that is, of harm or injury to the life of the party, — are sufficient."[3] In another case under the same statute it was observed: "There may have been no act done by way of attempting the apprehended injury, and yet the court can as well see that there is danger as though there had been many attempts."[4] Danger to the health comes by construction within this statute; for to impair health is to jeopardize life.[5]

§ 753. **General Views.** — Practitioners and judges may derive help from the statements of cases, and observations of courts, contained in the foregoing sections. Yet it will be only help; for the facts of cases differ, the circumstances of parties differ, and so the law must be newly applied to each case coming to

were clearly sufficient, and much more. And see the case of Atkins *v.* Atkins, reported ante, § 729, note.

[1] Hutchinson's Code, 495, 496; Holmes *v.* Holmes, Walk. Missis. 474.

[2] Pulliam *v.* Pulliam, 1 Freeman, Missis. 348. See also ante, § 736.

[3] Beebe *v.* Beebe, 10 Iowa, 133, 135, 139, opinion by Wright, C. J.; Cole *v.* Cole, 23 Iowa, 433.

[4] Caruthers *v.* Caruthers, 13 Iowa, 266, opinion by Baldwin, C. J.

[5] Cole *v.* Cole, supra. See, also, on the construction of this statute, Knight *v.* Knight, 31 Iowa, 451.

decision. And, indeed, perfect uniformity of decision, desirable as it is, cannot be expected on this subject. Judges are men; men are fallible; fallible men see things differently.

III. *The Relative Rights and Duties of Husband and Wife.*

§ 754. **Husband's Right to govern — Whether he may chastise Wife.** — In considering questions of cruelty, we are sometimes required to take into the account the relative legal rights and duties of husband and wife. It is clear doctrine in our law, that, in some sense, the husband is the head of the family, and as such is intrusted with a certain government over the wife.[1] But this power of the husband's has its limits, and its lawful and unlawful methods. It does not imply every thing which every person might infer from it. Lord Stowell observed, that the husband is intrusted by the law, not only with a certain degree of care and protection, but also "with authority over his wife. He is to practise tenderness and affection, and obedience is her duty."[2] There was a time, in the history of the English law, when he might issue his commands, and enforce obedience with the rod, the same as though she were his child. Thus, in a late Massachusetts case, the learned Chief Justice, Chapman, shows what was the old form of the writ of *supplicavit*, when it issued for the protection of the wife against the husband. It was "that he shall well and honestly treat and govern the aforesaid B (his wife), and that he shall not do nor procure to be done any damage or evil to her of her body, otherwise than what reasonably belongs to her husband for the purpose of the government and chastisement of his wife lawfully."[3] The way in which the old doctrine is generally laid down in the books is, that the husband may give the wife "moderate correction." This right was afterward questioned in England;[4] and at the present time it is believed that it would receive no countenance from any English court. In a late case before the full Divorce and Matrimonial Court, "the judge ordinary," says the report, "in summing up to the jury,

[1] 1 Bishop Mar. Women, § 45 et seq.

[2] Oliver *v.* Oliver, 1 Hag. Con. 361, 4 Eng. Ec. 429, 430.

[3] Adams *v.* Adams, 100 Mass. 365, 370.

[4] 1 Bl. Com. 444; Reeve Dom. Rel. 65.

observed: If a woman gets drunk and loses her self-possession, and makes use of personal violence towards her husband, or destroys his property, he may use some force or violence, if he cannot otherwise restrain her; if she comes drunk into his shop, he may take her by the shoulders and turn her out, but to follow after her and beat her is inexcusable; there is no law authorizing a man to beat his drunken wife."[1] In our own State of Mississippi, the court, in an early case, affirmed the old rule; yet they observed, that a husband should "confine himself within reasonable bounds when he thinks proper to chastise his wife." Consequently they held that he is capable in law of committing the offence of assault and battery upon her.[2] In North Carolina, the court, by Pearson, C. J., in a case not of a remote date, laid down the doctrine as follows: "The wife must be subject to the husband. Every man must govern his household; and if, by reason of an unruly temper, or an unbridled tongue, the wife persistently treats her husband with disrespect, and he submits to it, he not only loses all sense of self-respect, but loses the respect of the other members of his family, without which he cannot expect to govern them, and forfeits the respect of his neighbors. Such have been the incidents of the marriage relation from the beginning of the human race. Unto the woman it is said: 'Thy desire shall be to thy husband, and he shall rule over thee.' — Genesis, iii. 16. It follows that the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place."[3] But this doctrine was afterward qualified, at least in the form in which it was expressed. A husband being proceeded against criminally for a battery on his wife, the jury returned the following special verdict: "We find that

[1] Pearman *v.* Pearman, 1 Swab. & T. 601. See Prichard *v.* Prichard, 3 Swab. & T. 523.

[2] Bradley *v.* The State, Walk. Missis. 156, A. D. 1824. The opinion in this case, by Ellis, J., closes as follows: "Family broils and dissensions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy. To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned."

[3] Joyner *v.* Joyner, 6 Jones, Eq. 322, 325.

the defendant struck Elizabeth Rhodes, his wife, three licks with a switch about the size of one of his fingers (but not as large as a man's thumb) without any provocation except some words uttered by her and not recollected by the witness." Thereupon it was held that judgment was properly entered in favor of the defendant. It was deemed that the case was one in which there was no just ground or provocation for the chastisement; "therefore," said Reade, J., "the question is plainly presented, whether the court will allow a conviction of the husband for moderate correction of the wife without provocation." In holding that this could not be allowed (resulting, the reader perceives, in the liberty to any husband to whip his wife "moderately," whether obedient or disobedient, "with a switch about the size of one of his fingers but not as large as a man's thumb," without being held to answer for his conduct to the law), it was observed by the learned judge who delivered the opinion of the court, "that the ground upon which we have put this decision is not, that the husband has the *right* to whip his wife much or little; but that we will not interfere with family government in trifling cases. We will no more interfere where the husband whips the wife, than where the wife whips the husband; and yet we would hardly be supposed to hold, that a wife has a *right* to whip her husband. We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."[1] Consequently, in order to convict the husband of a battery on his wife, even in a case in which the two are living apart by agreement, it must appear that some permanent injury was inflicted, or such excessive violence or cruelty was employed as indicates malignity or vindictiveness.[2] But it is believed that the doctrine which gives immunity to the husband who whips his wife, whether with or without provocation, by way of "moderate correction" or otherwise, does not in any form prevail elsewhere in the United States;[3] and it is repudi-

[1] The State *v.* Rhodes, Phillips, 453, 455, 459.

[2] The State *v.* Black, 1 Winston, No. 1, 266.

[3] Fulgham *v.* The State, 46 Ala. 143, 147; Reeve Dom. Rel. 65; Bac. Ab. Bouvier's ed. tit. Bar. & Feme, B.; Bascom *v.* Bascom, Wright, 632; Poor *v.* Poor, 8 N. H. 307, 313; Perry *v.* Perry, 2 Paige, 501, 503; The State of New Jersey *v.* Barnhard, Essex, Oyer and Terminer, 1849, Newark Daily

ated in Ireland[1] and Scotland.[2] The importance of this question in its application to suits for divorce appears to be less, when we consider, that, in any view of it, unless we except the peculiar view taken by the North Carolina court, the husband could not screen himself from judicial consequences for beating his wife if she were free from blame;[3] and, if she were in fault, she would not ordinarily be entitled to a divorce, though the blows were inflicted without right.[4] Still there are divorce causes in which this matter becomes important.

§ 755. **Imprisonment of Wife.** — The husband has no general right to imprison his wife; "for," as the court in an old case observed, "she is entitled to all reasonable liberty, if her behavior is not very bad."[5] Yet when, as was said also in the same case, according to another report of it, "the wife will make an undue use of her liberty, either by squandering away the husband's estate, or going into lewd company;[6] it is lawful for the husband, in order to preserve his honor and estate, to lay such a wife under restraint. But when nothing of that appears, he cannot justify the depriving her of her liberty."[7] A wife having absented herself from the husband's house, without cause and without his knowledge or consent, he instituted a suit against her for the restitution of conjugal rights. She did not appear and answer to the suit, but absconded. Four years afterward he got her into his house by stratagem, and confined her in it; she declaring, that she would leave when she had the opportunity. The husband was held to be justified.[8] If there is a separation between the parties, under articles of separation, the right of the husband to exercise

Advertiser, 2 West. Law Jour. 301, Page on Div. 153, note; Atkins *v.* Atkins, ante, § 729, note; People *v.* Winters, 2 Parker, 10; James *v.* Commonwealth, 12 S. & R. 220, 226; The State *v.* Buckley, 2 Harring. Del. 552; Hurd on Habeas Corpus, 25; 1 Bishop Crim. Law, 5th ed. § 891.

[1] Carpenter *v.* Carpenter, Milward, 159.

[2] 1 Fras. Dom. Rel. 241, 469.

[3] Cochrane, Re, 8 Dowl. P. C. 630.

[4] Post, § 764–768. In Trowbridge *v.* Carlin, 12 La. An. 882, the divorce was denied, Cole, J., observing: "The [defendant] husband seems to have supported her [the wife's] ebullitions of temper for a long time; until, becoming wearied, he endeavored to correct her temper by corporeal punishment."

[5] Lister's Case, 8 Mod. 22; In re Price, 2 Fost. & F. 263.

[6] The State *v.* Craton, 6 Ire. 164.

[7] Rex *v.* Lister, 1 Stra. 477. And see Taylor *v.* Taylor, 2 Lee, 172, 6 Eng. Ec. 81. And see ante, § 735, and Atkins *v.* Atkins, ante, § 729, note.

[8] Cochrane, Re, 8 Dowl. P. C. 630, Wadd. Dig. 154, note.

personal restraint over the wife is at an end,[1] — a doctrine, however, hardly consistent with the English rule, that such articles will not bar the suit for the restitution of conjugal rights.

§ 756. **Continued.** — The right of the husband, however, to restrain the personal locomotion of the wife, if we assume it to exist in this country, is not with us well defined. There is plainly some right; because, if even the case were that of a stranger, there are circumstances in which restraint might be exercised to prevent the commission of a crime. Moreover, as the law makes the husband responsible criminally for crimes committed by the wife in his presence, and civilly for her torts whether he is present or absent, it must follow that he has the corresponding right so far to restrain her as to free himself from liability both civil and criminal. And we cannot well object to the North Carolina doctrine, that a husband may lawfully take his wife by force from the possession of an adulterer.[2] But, when we go further than this, the fact that the suit for the restitution of conjugal rights is not known in our country may possibly make a distinction between our law and the English, as to the right of the husband over the person of his wife. Yet upon this nothing can be said as having been established, one way or the other, by adjudication.

§ 757. **Continued.** — In a Pennsylvania case, the court observed: "A man owes to his wife affection, fidelity, and protection. He has a right to reciprocity of feeling, and he has a right to a reasonable control of her actions, as he is accountable, in many respects, for her conduct. It is a sickly sensibility which holds that a man may not lay hands on his wife, even rudely, if necessary, to prevent the commission of some unlawful or criminal purpose, or the use of a butcher's knife against a relative."[3] And this statement of the law does not materially differ from the views expressed in the last section. Where the law makes the husband responsible to third persons for the acts of his wife, or makes him a party to her crime committed in his presence, there, of course, the

[1] Rex *v.* Mead, 1 Bur. 542; Vane's Case, 13 East, 172, note, 1 W. Bl. 18; Hurd on Habeas Corpus, 34.

[2] 1 Bishop Crim. Law, 5th ed. § 891.

[3] Richards *v.* Richards, 1 Grant, Pa. 389, 392.

law must put into his hands the corresponding power of restraint. But where no such responsibility exists, surely the vague idea that the Supreme Being may hereafter put to the husband some unpleasant question relating to his influence over his wife, should not be construed, in the law, to authorize him to restrain her of her personal liberty, or to chastise her as though she were a child.

§ 758. **How far Wife conform to Husband's Habits, &c. — Worship — Friends.** — The wife should conform to the habits and tastes of her husband: therefore she cannot ordinarily complain of his peculiarities and eccentricities. Yet there is a limit to her obligation in this respect; for, if he has whims and caprices which operate in a way to endanger her health, she need not yield to them, but she may make them the ground of a suit for divorce.[1] Though it is an act of great unkindness and unreasonable oppression in a husband to forbid his wife to attend a particular church, of which she is a member;[2] or to interdict all intercourse with her family;[3] or to prevent her from paying a visit to his own relatives;[4] yet conduct like this is not alone a sufficient cause of divorce. It may in some circumstances tend to illustrate the temper of the husband; and his legal right may be enforced in an illegal manner. In one case the wife pleaded, that the husband had forbidden her to hold intercourse with her own family; and Lord Stowell, "not without hesitation," admitted the article, observing: "There may be circumstances that will justify that prohibition. And the court could ill judge of the reasonableness of such an injunction. Though the wife may be very amiable, her connections may not be so, and there may be many reasons which would justify such exclusion."[5]

§ 759. **Household Management.** — So, from the legal relation of husband and wife results the doctrine, that the former may take into his own hands the management of his household;

[1] Dysart *v.* Dysart, 1 Robertson, 470, 472, 512. See Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 349; ante, § 734.

[2] Lawrence *v.* Lawrence, 3 Paige, 267.

[3] Neeld *v.* Neeld, 4 Hag. Ec. 263, 269.

[4] D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 336.

[5] Waring *v.* Waring, 2 Hag. Con. 153, 159, 2 Phillim. 132, 1 Eng. Ec. 210, 213. And see Shaw *v.* Shaw, 17 Conn. 189, 195; Fulton *v.* Fulton, 36 Missis. 517.

and, if he does, and publicly inhibits his wife, this alone will not be cruelty for which a divorce will be granted; though, as aggravating and giving character to acts of cruelty proper, it may become important. "I cannot," says Lord Stowell, "call it cruelty if a gentleman chooses to settle his weekly bills himself; because I take it, that a wife acts in this respect, not by any original right, but as the steward and as the representative of her husband; and, if a man has but a moderate opinion of his wife's management, and is vain enough to have a better of his own; if he does choose to take into his own hands the payment of the weekly bills, I protest it does appear to me to be that kind of conduct with which no magistrate, ecclesiastical or civil, has any right to interfere."[1]

§ 760. **Marital Connection.** — The law gives the husband the right to have his wife occupy the same bed with himself. At the same time he may exercise this right in a manner to subject him to the charge of cruelty; for, as observed in a New Jersey case, "it is not questioned that a gross abuse of marital rights, resulting in injury or suffering to the wife, may constitute cruelty in the eye of the law."[2] There is a Connecticut case in which the husband is shown to have exercised his rights, in this respect, to an extent quite reprehensible. The wife was in feeble health; he, well and jealous; and, besides inflicting much general abuse, he often compelled her to his embrace, against her remonstrance, and her declaration that it injured her, at times when it was truly improper, unreasonable, and in fact injurious to her health. On two occasions, he even removed her by force from the bed of her daughter, to which she had retired, to his own. Her health being in jeopardy, and having actually suffered from this conduct, she left him, and brought her suit for divorce. The court found the facts to be as thus stated; and found, that, though she was in no danger of receiving other physical ill treatment from him, "she had just reason to fear he would compel her to occupy the same bed with him, regardless of the consequences to her health." But even on these proofs the majority of the

[1] Evans *v.* Evans, 1 Hag. Con. 35, 115, 116, 4 Eng. Ec. 310, 347; 1 Fras. Dom. Rel. 460.

[2] Green, Ch., in Moores *v.* Moores, 1 C. E. Green, 275.

judges were of opinion that she was not entitled to the divorce, and so they refused it; upon the technical ground, that the act of sexual intercourse between married persons is lawful in itself, and there was no evidence to charge him with knowledge of the injury he was inflicting upon her by it, except her own claim of suffering in health from this cause.[1] It cannot be doubted that the majority of our American judges would differ from the conclusion to which the majority of the Connecticut court arrived on these facts. When the wife claimed that she was injured by this undue exercise of what was otherwise his rights, and he saw her droop under the injury which the proof established to be real and not feigned, and when it was admitted that even after this judicial investigation a return to cohabitation would subject her to continued inroads of the same sort upon her health, it is difficult to see how the technical right of husbands to do what will not injure their wives could be introduced to give authority to this husband to kill this wife.[2]

IV. *Cruelty by the Wife to the Husband.*

§ 761. **General Doctrine.** — Though, in cases of cruelty, the complaint usually comes from the wife as the weaker party, yet the law which prevails in England and most of our States authorizes the divorce equally on prayer of the husband for her cruelty.[3] In some of the American States, the right is by statute given to the wife alone.[4] Where the husband is complainant, "it is not," according to Chancellor Walworth, "sufficient to show a single act of violence on her part towards him, or even a series of such acts; so long as there is no reason

[1] Shaw *v.* Shaw, 17 Conn. 189; ante, § 734, note.

[2] And see ante, § 734, 758.

[3] Furlonger *v.* Furlonger, 5 Notes Cas. 422; Kirkman *v.* Kirkman, 1 Hag. Con. 409; Waring *v.* Waring, 2 Phillim. 132, 1 Eng. Ec. 210; White *v.* White, 1 Swab. & T. 591, ante, § 717, note; Ayl. Parer. 229; Oughton, tit. 193, § 18; Lynch *v.* Lynch, 33 Md. 328; Kempf *v.* Kempf, 34 Misso. 211; Jones *v.* Jones, 16 Smith, Pa. 494.

[4] In New York, the act of April 10, 1824, § 12, authorized a divorce from bed and board on prayer of the husband for the wife's cruel treatment; but, in the Revised Statutes of 1830, this remedy was given only to the wife. By accident, however, the earlier statute was not expressly repealed; and so it was held to remain in force. Perry *v.* Perry, 2 Barb. Ch. 311; Perry *v.* Perry, 2 Paige, 501; Van Veghten *v.* Van Veghten, 4 Johns. Ch. 501; McNamara *v.* McNamara, 2 Hilt, 547, 549.

to suppose that he will not be able to protect himself and family by a proper exercise of his marital power." But the husband may "establish such a continued course of bad conduct on the part of the wife, towards himself and those who are under his protection and care, as to satisfy the court that it is unsafe for him to cohabit or live with her." And the Chancellor held, that the complaining husband may state in his bill acts of violence and misconduct toward his children and other members of the family.[1] Still, evidently the general principles of law must be the same, whether the suit is promoted by the husband or the wife; but, in the application of these as of all other principles, the relative rights and duties imposed by the marriage must be considered; sometimes perhaps, also, the relative physical strength and mental constitution and temperament of the parties.[2] But the further consideration, that, except in a few States where statutes have changed the common-law rule, the guilty wife can have no provision decreed by the court for her separate support, though her own property has vested in her husband, may sometimes prevail with a merciful judge. In view of this condition of things in New York, Chancellor Walworth said: "It must, therefore, be a very strong case, which will induce this court to grant a final separation, on application of the husband."[3] Perhaps the court, however, might accomplish substantial justice in a particular case, by granting to the husband his divorce on condition of his restoring a reasonable amount of property to the wife.[4]

§ 762. **Continued.** — No sufficient reason exists why the divorce for cruelty should not be allowed to an injured husband, as well as to an injured wife. The facts of cases do indeed show, that less frequently has the stronger party occasion to complain than the weaker. But if we were to look at this question as merely referring to the physical strength of the parties, we should find numerous instances in which the ad-

[1] Perry *v.* Perry, 1 Barb. Ch. 516; ante, § 736.

[2] See ante, § 714, 754–760; Doyle *v.* Doyle, 26 Misso. 545, 546.

[3] Palmer *v.* Palmer, 1 Paige, 276. See also Sheffield *v.* Sheffield, 3 Texas, 79; Byrne *v.* Byrne, 3 Texas, 336; De La Hay *v.* De La Hay, 21 Ill. 252.

[4] In a late English case on a divorce for the wife's cruelty, there was an application on her behalf for alimony. "But the court, in the absence of any precedent in support of the application, refused to make any order." White *v.* White, 1 Swab. & T. 591, 594.

vantage in strength is with the wife. Yet this is by no means the proper view of it. The safety, even physical, of one in the marital relation does not depend on the possession of greater physical power than the other, though we should admit the right to use the power. But we have seen[1] that a husband is not justified in chastising his wife to make her obedient or good; also,[2] that his right to shut her up is questionable, at least, — how, then, when her conduct toward him puts him in peril, is he to right himself, if the suit for cruelty is denied? This inquiry will further suggest, that no great difference, after all, should be made by the courts in estimating a case of cruelty, whether the complaint comes from the husband or from the wife. If often she is found to be the more lovable and amiable of the two, she is not always so. When she is not, but is even worse for her sex, the court pays no compliment to woman by permitting this circumstance to shield her from the consequences of unsexing herself.[3]

§ 762 *a*. **Continued.** — In 1864, a case was decided in the English Divorce Court, by Lord Penzance, quite in harmony with the views thus expressed by the author. The facts, as stated by the learned judge, were the following: "The cohabitation of the parties has been very long; and there is a large family, many of them now grown up. The great and unrestrained violence of the wife, her irritability on all, even the slightest occasions, her bursts of unprovoked ill temper, and the abuse she habitually heaped on her husband, were fully proved. But she went further. She ventured from time to time to lift her hand against him. She added personal outrage to the degradation of foul language. Emboldened by a policy of passive resistance which during the last fifteen years he had adopted from religious motives, she sought to rule his conduct by threats of personal attack; and finally, she thrust herself before him on the steps of a public chapel, the service of which he was attending against her will; assailed him with abuse and blows, and as the sole refuge from an unseemly struggle, drove him with ignominy home. The excitement caused by this unwomanly deed, and perhaps still more the nervous shock sus-

[1] Ante, § 754.
[2] Ante, § 755, 756.
[3] And see Gholston *v.* Gholston, 31 Ga. 625.

tained by him in the necessary effort of self-restraint, induced a fit and much mental and bodily suffering." Here, it is perceived, there was no attempt by the husband to exercise physical restraint, which, it may be supposed, would have been effectual. Moreover, said the judge, "I do not believe that his wife ever intended or is likely to do him serious harm by personal violence." Yet it was not deemed by this learned judge to be the duty of the husband to measure strength with the wife, or, if he declined, to abstain from seeking the protection of the court. "Where the woman is the assailant," it was observed, "many a man may submit to the outrage of a blow, who would defend himself from real injury if imminent." And on a consideration of the whole case, the court deemed that the husband was entitled to the judicial separation he prayed.[1]

§ 763. **What sufficient under Iowa Statute.** — In Iowa, where the statute provided for a divorce in cases of treatment dangerous to the life,[2] a husband proceeding against his wife alleged, in substance, that she had shamefully treated him by beating and bruising him without just cause; that she had at divers times declared it would be right for her to put poison into his food, and she should be glad if he were dead; that his occupation required him to keep at all times certain poisons about his house; and that he had been compelled to exercise the greatest caution to keep such poisons out of her way, fearing she would get possession of them and endeavor to poison him. And, on demurrer, the facts thus set forth were held to constitute sufficient ground for the divorce.[3]

V. *The Effect of Ill Conduct in the Complaining Party.*

§ 764. **General Doctrine.** — In our second volume, the various grounds upon which suits for divorce may be defended, will be set out. There we shall see, that, if a party proceeding for a divorce is guilty of the same thing which he alleges against the

[1] Prichard *v.* Prichard, 3 Swab. & T. 523. The learned judge, however, held that the husband, in this case, should be required to make some provision for the wife; and overruled White *v.* White, 1 Swab. & T. 591, and Dart *v.* Dart, 3 Swab. & T. 208, in which it had been held that this could not be done. "I think," he said, "if there is no precedent, I ought to make one."

[2] Ante, § 752.

[3] Beebe *v.* Beebe, 10 Iowa, 133.

other party, his prayer will not be granted.[1] But the peculiar nature of this suit for cruelty makes another defence of the like nature relevant; namely, — If what is complained of as cruelty is the natural and probable return for the complainant's own misconduct, it will not furnish ground for the proceeding. "The remedy is in her own power; she has only to change her conduct; otherwise the wife would have nothing to do but to misconduct herself, provoke the ill treatment, and then complain."[2] But though the wife may have brought the evil on herself, the way of reform is open to her; and if, after she reforms, the husband is guilty of cruelty, the court will then interpose.[3]

§ 765. **Violence in Excess of Provocation.** — "If, however," said Dr. Swaby, "it should appear that even misconduct on the wife's part has produced a return from the husband wholly unjustified by the provocation, and quite out of proportion to the offence, it might still be the duty of the court to interfere judicially, notwithstanding such wife's positive misconduct." Suppose, therefore, it were proved, as alleged in the case then before the court, that the husband had attempted to burn his wife alive; she might probably be entitled to a divorce, though herself guilty of gross misbehavior.[4] And in Evans *v.* Evans, Lord Stowell said: "Of the character of Mrs. Evans, I shall say much less; for this reason, because it is much less connected with the issue in the cause; because, if the facts imputed to Mr. Evans are false, there is an end of the question. On the contrary, if they are true, they are of that nature and species, that they cannot be justified by any misconduct on the part of Mrs. Evans; for, though misconduct may authorize a husband in restraining a wife of her personal liberty, yet no misconduct of hers could authorize him in occasioning a pre-

[1] Vol. II. § 74 et seq.

[2] Waring *v.* Waring, 2 Phillim. 132, 133, 1 Eng. Ec. 210, 211; Moulton *v.* Moulton, 2 Barb. Ch. 309; Poor *v.* Poor, 8 N. H. 307; Anonymous, 4 Des. 94; Daiger *v.* Daiger, 2 Md. Ch. 335; Skinner *v.* Skinner, 5 Wis. 449; Richards *v.* Richards, 1 Wright, Pa. 225, 228; Johnson *v.* Johnson, 14 Cal. 459, 460; Von Glahn *v.* Von Glahn, 46 Ill. 134; Reed *v.* Reed, 4 Nev. 395; Harper *v.* Harper, 29 Misso. 301. And see Lalande *v.* Jore, 5 La. An. 32; Bedell *v.* Bedell, 1 Johns. Ch. 604; Devaismes *v.* Devaismes, 3 Code Reporter, 124, 3 Am. Law Journal, N. S. 279.

[3] Waring *v.* Waring, supra; Best *v.* Best, 1 Add. Ec. 411, 423, 2 Eng. Ec. 158, 163; Skinner *v.* Skinner, 5 Wis. 449.

[4] Best *v.* Best, 1 Add. Ec. 411, 423, 2 Eng. Ec. 158, 163, 164.

mature delivery, or refusing her the use of common air. In every view therefore of the matter, Mrs. Evans's character has nothing to do with the cause."[1] And the Alabama court granted a divorce to a wife who was to blame; because her husband visited her ill conduct with a greatly disproportionate degree of ill conduct on his part.[2] And there are other cases of the same sort.[3]

§ 766. **Continued.** — In Westmeath *v.* Westmeath, is a passage from Sir John Nicholl illustrating both this point and several others, thus: "Besides the endurance of many privations during the severe winter of 1813–14, when in a state of advanced pregnancy, an act of personal violence occurs, which is thus deposed to by Mackenzie, on the seventh article: 'About a month before Lady Westmeath's confinement, Lord Westmeath called deponent up about four o'clock one morning, to go to Lady Westmeath; when deponent went, Lady Westmeath was lying in bed, and Lord Westmeath standing in his dressing-gown; deponent asked Lady Westmeath if she was taken ill; she said no; but that Lord Delvin [the husband as known before he became Marquis of Westmeath] had been beating her, and had kicked her in the side; and she complained of being in pain from it. Lord Westmeath then said, "Emily, you provoked me to do it." Lady Westmeath looked at him, but said nothing to him; but asked deponent, why she had come. Deponent said, Lord Delvin had called her. Lady Westmeath said, she might go to her own room again. Lord Westmeath appeared by his manner, when he called her, to be frightened.' An admission of the truth of the charge is here, then, necessarily implied from his observation, 'You provoked me to do it.' It is true, that, when he has done it, he himself is frightened, and calls the maid; but he in effect admits that her statement is correct. How ungovernable must be the passions of a husband, who, scarcely a month before his wife's confinement of her first child, can be

[1] Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 316; s. p. Waring *v.* Waring, 2 Phillim. 132, 1 Eng. Ec. 210.

[2] King *v.* King, 28 Ala. 315. And see ante, § 754 and note.

[3] Rutledge *v.* Rutledge, 5 Sneed, 554; Severn *v.* Severn, 3 Grant, U. C. Ch. 431; Jackson *v.* Jackson, 8 Grant U. C. Ch. 499; Eidenmuller *v.* Eidenmuller, 37 Cal. 364. And see Thomas *v.* Tailleu, 13 La. An. 127.

hurried away to such an outrage; it requires no definition of cruelty to pronounce this to be an act of aggravated cruelty. 'You provoked me to do it;' no provocation could justify or palliate it." [1]

§ 767. **Illustrations of Provocation barring Remedy — Limits of the Doctrine.** — Yet observations like the foregoing are probably applicable only where the facts are of a character similar to those which called them forth; [2] for, when the ill treatment does not come up to the extreme point, the wife, who has been greatly in fault, cannot have her divorce, though her husband is not justifiable, and an indictment against him for the battery will lie.[3] In Waring *v.* Waring, Lord Stowell himself observed: "Though I may not be able to exonerate the husband from blame, the wife's own conduct does not give her a title to complain." [4] And Dr. Lushington has said: "If a wife can insure her own safety by lawful obedience, and by proper self-command, she has no right to come here; for this court affords its aid only when the necessity for its aid is absolutely proved." [5] Thus it was held in Louisiana, that, if the wife behaves in an outrageous manner toward her husband, and he ill-treats her, she cannot have a decree of separation for this. "The law," said the court, "which provides for a separation from bed and board in certain cases, is made for the relief of the oppressed party, not for interfering in quarrels where both parties commit reciprocal excesses and outrages." [6] So in Alabama the like doctrine was laid down; yet Goldthwaite, J., added: "There are, of course, some acts of violence, such as involve danger to life, limb, or health, — acts which render it absolutely necessary for the safety of the

[1] Westmeath *v.* Westmeath, 2 Hag. Ec. Supp. 1, 79, 4 Eng. Ec. 238, 274.

[2] Ante, § 63.

[3] Ante, § 754 and note, 764.

[4] Waring *v.* Waring, 2 Phillim. 132, 144, 1 Eng. Ec. 210, 216; Taylor *v.* Taylor, 2 Lee, 172, 6 Eng. Ec. 81; Kimball *v.* Kimball, 13 N. H. 222; Poor *v.* Poor, 8 N. H. 307. The last case is both able and *readable*.

[5] Dysart *v.* Dysart, 1 Robertson, 106, 140. This case was appealed to the Arches Court, where the decision of Dr. Lushington was overruled by Sir Herbert Jenner Fust; but I do not understand the latter judge to have dissented generally from the principles of law laid down by the former, though he did disapprove of an expression immediately preceding the one quoted in the text. Ib. 512. A further appeal was taken, but it was abandoned on a compromise between the parties. Ib. 543; Wadd. Dig. 155.

[6] Durand *v.* Her Husband, 4 Mart. La. 174, Derbigny, J. Ante, § 734.

wife that she should be separated from the husband; and, when conduct of this character is proved, it admits of no palliation or excuse, if intentionally done." [1] Doubtless the court, in determining whether the rule of refusing the divorce to the wife whose ill conduct drew from the husband the conduct of which she complains, is applicable in a particular case or not, will consider, not so much what in obedience to the law of Christianity the husband should do, but what, seeing "husbands are men and not angels," he would naturally be prompted to do.[2]

§ 768. **Doctrine epitomized.** — We may therefore lay down the doctrine, that, on the one hand, though the ill conduct of the wife was such as to contribute in a measure to what she complains of in her husband, and though his ill conduct did not reach the extreme point, still if the latter was very aggravated, she may have her divorce for it; [3] while, on the other hand, she cannot ordinarily complain with effect if materially in fault herself. Yet always the more unexceptionable her conduct, the more meritorious her cause.[4] It may be difficult to say, precisely, how much ill behavior on her part will, in a given case, take away her remedy. On this question it has been well remarked, that "the criterion by which, in human tribunals, the conduct of human beings is to be estimated, should be formed, not according to the rule either of ideal perfection or of occasional excellence, but according to the standard which, being attainable by the various classes to which it is to be applied, is sufficiently high to insure the preservation and promotion of the morals and good order of society." [5] The court will accordingly look at the origin of matrimonial quarrels, and see to which of the parties the first blame is to be imputed; [6] and, if the complaining wife's misconduct has been

[1] David *v.* David, 27 Ala. 222, 224.

[2] Fleytas *v.* Pigneguy, 9 La. 419. On this subject see also Boyd *v.* Boyd, Harper, 144; Mayhugh *v.* Mayhugh, 7 B. Monr. 424. And see Watkinson *v.* Watkinson, 12 B. Monr. 210.

[3] See Doyle *v.* Doyle, 26 Misso. 545, 547.

[4] Holden *v.* Holden, 1 Hag. Con. 453; Dysart *v.* Dysart, 1 Robertson, 106, 133, 134; Taylor *v.* Taylor, 4 Des. 167; Headen *v.* Headen, 15 La. 61; Jones *v.* Jones, Wright, 155; Griffin *v.* Griffin, 8 B. Monr. 120.

[5] Marshall, C. J. in Mayhugh *v.* Mayhugh, 7 B. Monr. 424.

[6] Mayhugh *v.* Mayhugh, supra; Waring *v.* Waring, 2 Phillim. 132, 1 Eng. Ec. 210, 212.

provoked by her husband, this will weigh materially in her favor.[1] On the other hand, if she has fallen into any impropriety, though not criminal in it, and her husband's jealousy is thereby excited, she should use every reasonable effort to soothe his excitement, and remove its cause.[2] And if, though she is wholly blameless, her husband suspects her of adultery and accuses her of it, she should not increase his suspicions by her conduct, but strive to allay them.[3]

VI. *The Distinction between the Law and the Evidence on this Subject.*

§ 769. **General Views.** — In the foregoing discussions is embraced, under the head of the law as distinguished from the evidence, almost the entire chapter which in the one-volume editions was devoted both to the law and the evidence. Yet, in truth, what is brought forward in this chapter, as it stands in the present edition, pertains in part to the evidence, not wholly to the law. The intent with which an act of violence was committed by the husband is plainly for the jury. And where all the acts are brought together, and their intent is settled, still it remains a question of fact, not of law, whether the result shows that the continuance of the cohabitation would be attended with danger to the complaining party. But danger of what? And to what degree? The kind and degree of danger must necessarily pertain to the law of the case; while yet it is a thing of fact that danger, of the kind and to the degree ascertained, does or does not exist; and upon this question of fact the jury should pass, not the court. These propositions, resting in legal reason, the author states with confidence in their correctness, yet he is not able to verify them by adjudication. If they are accepted, they will, by analogy, explain most of the particular questions of difficulty which are likely to arise under this head.

§ 770. **Cresswell's Distinction.** — In a late English case, the judge ordinary, Sir C. Cresswell, observed: "I apprehend that, in such a case as this, I shall be bound to direct the jury

[1] Graecen *v.* Graecen, 1 Green Ch. 459; Bascom *v.* Bascom, Wright, 632.

[2] Mayhugh *v.* Mayhugh, supra; Anthony *v.* Anthony, 1 Swab. & T. 594.

[3] Harper *v.* Harper, 29 Misso. 301.

what acts constitute legal cruelty, and they will have to find whether the acts done are cruelty or not;" as well as find whether the alleged acts were done.[1] These observations come within the general doctrine as stated in our last section.

CHAPTER XLIV.

DESERTION.

§ 771. **How by the Unwritten Law — Restitution of Conjugal Rights — Present English Law.** — The law of England, as imported by our forefathers into this country, did not allow of divorce for the desertion of one of the married parties by the other.[2] Yet it provided the suit for the restitution of conjugal rights, as a sort of substitute for justice. By this proceeding the delinquent party is compelled to return to cohabitation, if the other, says Blackstone, "be weak enough to desire it."[3] Either the husband or the wife may appear as complainant

[1] Tomkins *v.* Tomkins, 1 Swab. & T. 168, 169.

[2] Godolphin says: "The civil and canon law do allow of divorce, after a *long absence*, but are not agreed touching the time of that absence; for in one place it is after two years, in another after three years, in another after four. Others hold, that the civil law requires five years' absence before there may be a divorce on that account. In the Council of Lateran, a sentence was allowed by the whole council, which was given by a bishop, pronouncing a divorce for a woman complaining that her husband had been absent ten years, giving also leave to the woman to marry again. But the truth is, no absence, be it for any time whatever, doth properly cause a divorce in law. Indeed, seven years' absence, without any tidings or intelligence of or from the absent party, will so far operate in law towards what is equivalent to a divorce as to indempnise the woman from the penalty of polygamy, if in that case she marry again. Also the canon law hath decreed, that, if the wife refuse to dwell with her Christian husband, he may lawfully leave her." Godol. Ab. 194. And see, on the subject of desertion, ante, § 26, 40.

[3] 3 Bl. Com. 94. And see ante, § 28.

in this suit against the other, when delinquent. If the wife, for example, brings the suit and establishes her claim, there is a decree that the husband receive her back, and likewise treat her with conjugal affection; and he will not be discharged from the suit until he has complied with both branches of the decree.[1] Should he refuse obedience, the court, on her prayer (this is the former practice of the ecclesiastical courts), will pronounce him in contempt; and he will be imprisoned until he obeys. Even the court itself cannot release him on any other condition than obedience.[2] The late English statute of 20 & 21 Vict. c. 85, provides, in § 16, for the judicial separation, not only on the grounds of cruelty and adultery, but likewise of "desertion without cause for two years and upwards." The suit for the restitution of conjugal rights, however, is not abolished, but is maintainable in the new court.[3]

§ 772. **How in United States.** — In the United States, the remedy for desertion, where any remedy is provided by law, is a suit for divorce. The suit for the restitution of conjugal rights has not been adopted in any of our States;[4] but the principles which govern this suit are, to some extent, applicable to the divorce suit. We shall therefore have occasion to consider those principles a little in this chapter.

§ 773. **Varying Terms of our Statutes.** — The offence of desertion, as a ground of divorce, is described in various language in the statutes of the different States; but the several phrases employed, when brought by interpretation into conjunction with the general doctrines which govern this department of our jurisprudence, produce substantially the same legal meaning. Thus, under a statute of Mississippi, which provided a

[1] Gill *v.* Gill, cited in Orme *v.* Orme, 2 Add. Ec. 382, 2 Eng. Ec. 354, 355; Evans *v.* Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 349.

[2] Barlee *v.* Barlee, 1 Add. Ec. 301. For special circumstances, however, in which, by the aid of certain English statutes, the husband in contempt was discharged from imprisonment without obedience to the original sentence, see Lakin *v.* Lakin, 1 Spinks, 274.

[3] Hayward *v.* Hayward, 1 Swab. & T. 81; Hope *v.* Hope, 1 Swab. & T. 94; Sopwith *v.* Sopwith, 2 Swab. & T. 160; Burroughs *v.* Burroughs, 2 Swab. & T. 303, 544; Scott *v.* Scott, 4 Swab. & T. 113; Anquez *v.* Anquez, Law Rep. 1 P. & M. 176; Blackborne *v.* Blackborne, Law Rep. 1 P. & M. 563; Crothers *v.* Crothers, Law Rep. 1 P. & M. 568; Miller *v.* Miller, Law Rep. 2 P. & M. 13.

[4] Ante, § 31. And see Cruger *v.* Douglas, 4 Edw. Ch. 433, 506.

divorce from the bond of matrimony "for wilful, continued, and obstinate desertion for the space of three years;"[1] of Florida, "for wilful, obstinate, and continued desertion, by either party, for the term of a year;"[2] of Connecticut for "wilful desertion for three years, with total neglect of duty by the other party;"[3] of Ohio, "where either of the parties shall have been wilfully absent from the other for three years;"[4] of Iowa, when either party "wilfully deserts" the other, "and absents himself, without a reasonable cause, for the space of one year;"[5] of Pennsylvania, when either party is chargeable with "wilful and malicious desertion, and absence from the habitation of the other, without a reasonable cause, for and during the space of two years;"[6] of Missouri, "when either party has absented herself or himself, without a reasonable cause, for the space of two years;"[7] of New Hampshire, "when either party, without sufficient cause, and without consent of the other, shall have abandoned such other, and refused for three years to cohabit with such other;"[8] of Georgia, for "wilful and continued desertion" for three years;[9] of California, for "wilful desertion by either party for the period of two years;"[10] — the offence which authorizes a divorce is committed by an abandonment of the like kind, differing only in the period of its continuance.[11] These specimens of phrases will serve to illustrate the whole.[12]

[1] Fulton *v.* Fulton, 36 Missis. 517. The New Jersey statute is in like terms, Cook *v.* Cook, 2 Bearsley, 263.

[2] Thompson's Digest, p. 223.

[3] R. S. of 1849, c. 2, § 10,

[4] Swan's Stat. of 1840, c. 40, § 1.

[5] Code of Iowa, of 1851, p. 223.

[6] Stat. of March 13, 1815, Dunlap's Laws, p. 319; Butler *v.* Butler, 1 Parsons, 329.

[7] Freeland *v.* Freeland, 19 Misso. 354.

[8] Payson *v.* Payson, 34 N. H. 518.

[9] Word *v.* Word, 29 Ga. 281.

[10] Benkert *v.* Benkert, 32 Cal. 467.

[11] To avoid misapprehension, I wish to state explicitly, that, in the text, I have not aimed to give the present statute law existing in the States mentioned; and what is true of this section is true throughout these volumes. The statutes are continually changing, and I exhort each practitioner to consult for himself the existing enactments of his own State.

[12] As to the Kentucky statute, see Becket *v.* Becket, 17 B. Monr. 370, and Watkinson *v.* Watkinson, 12 B. Monr. 210; as to the Maryland, Brown *v.* Brown, 2 Md. Ch. 316, and Levering *v.* Levering, 16 Md. 213. The Massachusetts statute on this subject has varied; at the present time it stands thus: "A divorce from the bond of matrimony may be decreed in favor of either party when one party has deserted the other for five years consecutively; provided, that, when the libel is filed by the party deserting, it appears that the desertion was caused

§ 774. **Scotch Law — Louisiana.** — The Scotch statute was enacted in 1573, and it is as follows: It provides, that, if either the husband or wife "divertis fra uther's companie without ane reasonable cause alledged or reduced befoir an judge, and remainis in their malicious obstinacie be the space of foure zeires, and in the meane time refusis all privie admonitions, the husband of the wife, or the wife of the husband, for dew adherence: That then the husband, or the wife, sall call and persew the obstinate person offender befoir the Judge Ordinar for adherence. And in case no sufficient causes be alledged quhairfoir na adherence suld be, but that the sentence proceedis against the offender refusand to obey the samin: The husband or the wife sall meene themselves to the superior magistrate, *videlicet* the Lords of Session, and sall obteine letters in the four formes, conforme to the sentence of adherence: Quhilk charge being contemned, and therefoir being denunced rebel and put to the horne, then the husband or the wife to sute the spiritual jurisdiction and power, and require the lauchful archbishop, bishop, or superintendant of the countrie quhair the offender remaines, to direct privie admonitiones to the said offender, admonisching him or her, as befoir, for adherence; Quhilkes admonitiones gif he or she contemptuously disobeys, that archbishop, bishop, or superintendant, to direct charges to the minister of that parochin quhair the offender remaines; or, in case there be nane, or that the minister will not execute, to the minister of the next adjecent kirk theirto, Quha sall proceede against the said offender with publick admonitiones, and gif they be contemned, to the sentence of excommunication — Quhilk anis

by extreme cruelty of the other party, or that the desertion by the wife was caused by the gross or wanton and cruel neglect of the husband to provide suitable maintenance for her, he being of sufficient ability so to do" Gen. Statutes, c. 107, § 7. For the earlier statutes of this State on the subject, see the earlier editions of this work. The English Stat. 20 & 21 Vict. c. 85, § 16, provides, that "a sentence of judicial separation (which shall have the effect of a divorce *a mensa et thoro* under the existing law, and such other legal effect as is herein mentioned) may be obtained either by the husband or the wife on the ground of adultery or cruelty, or desertion, without cause for two years and upwards." And by § 27 of the same statute, adultery in the husband may be available to the wife as a ground of divorce from the bond of matrimony, when, among other things, it is "coupled with desertion without reasonable excuse for two years or upwards." For a fuller sketch of the present English statutory law, see ante, § 65, note.

being pronounced, the malicious and obstinat defection of the partie offender to be ane sufficient cause of divorce, and the said partie offender to tyne and lose their tocher and donationes *propter nuptias*." Fraser says, that "the only particulars in this statute now in desuetude, are the letters of four forms, which have been superseded by letters of horning, and presbyteries have come in room of the bishop."[1] The Louisiana statute is, or at some period was, modelled somewhat upon the Scotch. The abandonment must be made to appear by three iterated summonses, from month to month, to the party, to return to the matrimonial domicil; each one followed by a sentence, to be served on the delinquent, ordering the return.[2] And there may be some of our other States in which the law of desertion, as seen in the statutes, differs more or less from the law as drawn out in the statutes quoted in our last section.

§ 775. **"Desertion" — "Wilful Desertion" — "Malicious Desertion" — How the Varying Statutory Terms construed.** — Probably the single word "desertion," or the words "wilful absence," with no qualification except that of time, would alone convey the full legal meaning contained in most of the foregoing statutory provisions; because, if the plaintiff had consented to the absence, he would be barred on the ground of connivance; if the separation had been interrupted by an interval of cohabitation, this cohabitation would, as a condonation, cut off the right to complain of the previous conduct, unless indeed the doctrine of the conditional quality of the condonation should be literally applied here; and, in every view, the absence could not be a ground of divorce unless wilful. Yet in Tennessee, where the words of the statute were "wilful and malicious desertion or absence by the husband or wife, without a reasonable cause, for the space of two years," — the court gave stringent and peculiar effect to the word "malicious;" making it control the whole clause, and mean malice in fact, as distinguished from malice in law; and defining malice as "enmity of heart, or unprovoked malignity toward the person deserted." And

[1] 1 Fras. Dom. Rel. 680, 681. Since Fraser wrote, the "Conjugal Rights Amendment Act of 1861" (24 & 25 Vict. c. 86) may have somewhat affected the Scotch law on this subject, but not essentially.

[2] Perkins *v.* Potts, 8 La. An. 14. See further as to the Louisiana statute, Muller *v.* Hilton, 13 La. An. 1.

the judge said, that such malice "must be the motive which induced the desertion," and no other motive will stand in its stead. The point adjudged, however, was simply, that to allege and prove a mere absence "without any just or probable cause" during the statutory period would not authorize the judgment of divorce under the statute.[1] Clearly, however, this Tennessee construction, if we look at the dicta of the court and not at the mere point decided, is different from what is given to similar words elsewhere.[2] Indeed it may be set down as the better view, that a wilful abandonment of matrimonial cohabitation is in contemplation of law malicious.[3]

§ 776. **Definition — How the Chapter divided.** — The reader will find, in the subsequent sections of this chapter, a sufficiently full statement of the doctrines which pertain to this subject of desertion; but it will be convenient and helpful to him to be furnished, in advance, with the following definition: Desertion, in divorce law, is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or the wrongful conduct of the other. In discussing this subject, we shall follow substantially the order of the definition, considering, I. The Ceasing to cohabit; II. The Intent to desert; III. The Justification; and, as supplemental to this discussion, IV. The Continuity of the Desertion; V. The Distinction between the Law and the Evidence.

I. *The Ceasing to cohabit.*

§ 777. **Two Elements of the Offence — (Meaning of Word "Cohabitation," in the Note).** — Plainly the offence of desertion, considered without reference to matter which may exist in justification, consists in, first, the actual ceasing of the cohabitation;[4] and, secondly, the intent in the mind of the offending

[1] Stewart *v.* Stewart, 2 Swan, Tenn. 591. In another case, where the separation was in accordance with the wish of the complaining party, it was held not to be sufficient under the statute. And the judge observed: "If the party goes or remains away for 'reasonable cause,' or even without good and sufficient cause, but not of malice, the divorce cannot be obtained." Rutledge *v.* Rutledge, 5 Sneed, 554, 556, opinion by Carruthers, J.

[2] 1 Bishop Crim. Law, 5th ed. § 427–429.

[3] McClurg's Appeal, 16 Smith, Pa. 366.

[4] The meaning of the word "cohabitation," as used in our books of the

party to desert the other. These two ingredients must combine.[1] But it is wholly immaterial whether the distance to

law, is perhaps plain enough; but there has been in regard to it a manifest confusion in some minds. Therefore, as precision is of the highest importance in every statement of legal doctrine, I have usually in these volumes employed some other word in its stead. Webster defines cohabitation thus: "1. The act or state of dwelling together, or in the same place with another. 2. The state of living together as man and wife, without being legally married." Worcester defines cohabit, "to live together; to dwell with another; to live together as husband and wife." Milton writes of a man's leaving "the dear cohabitation of his father, mother, brothers, and sisters." On the other hand, Chancellor Walworth, in Dunn *v.* Dunn, 4 Paige, 425, 428, apologizes for a solicitor and his client, in respect to some proceedings, on the ground of their "ignorance," in not understanding "what the *legal meaning* of cohabitation was; and that they both understood that voluntary cohabitation meant nothing more than that they slept together in the same bed." I am not aware that other judges have often employed this word to denote actual sexual intercourse, further than may be presumed from the dwelling together in the same house of parties under the claim of being married; or as necessarily implying even an occupancy, by the husband and wife, of the same bed. The words "matrimonial cohabitation" have even been used, in distinction from "matrimonial intercourse," to signify a living together in the same house, without copula. Thus, Lord Stowell adopts the expression of Dr. Harris, one of the advocates of the Ecclesiastical Court, that "the duty of matrimonial intercourse cannot be compelled by this court, though matrimonial cohabitation may." Forster *v.* Forster, 1 Hag. Con. 144, 154, 4 Eng. Ec. 358, 363. And where the wife alleged, that, while the husband allowed her to reside in the same house with him she was "*denied access to his person and bed*, and refused common necessaries for her support," Sir Christopher Robinson observed: "The parties are admitted to be actually cohabiting;" though there was no "matrimonial intercourse." Orme *v.* Orme, 2 Add. Ec. 823, 2 Eng. Ec. 354. See Rogers Ec. Law, 2d ed. 896. In another case, Lord Stowell observed concerning the proof of adultery, that, where parties who are alleged to have committed the offence "have gone so far as to perform the ceremony of marriage in a church, and they have since lived together ostensibly as man and wife, that fact, so assisted by the subsequent *cohabitation* is strong *presumptive* evidence of an adulterous intercourse, and will fix it." Nash *v.* Nash, 1 Hag. Con. 140, 4 Eng. Ec. 357. And to go a little further back, the author of the preface to Swinburne on Spousals, speaking of the contract of marriage *per verba de præsenti*, without formal solemnization, says: "In some places the woman, after these spousals, presently *cohabited* with the man, but *continued unknown* until the marriage day." In Ohio *v.* Conoway, Tappan, 58, a decision, not of the highest court of the State, but useful as showing the meaning of a word, "cohabitation" was defined to signify "a living together in one house," in distinction from a mere travelling in company together; and the judge plainly did not understand its import to extend further. See also Commonwealth *v.* Calef, 10 Mass. 153. I know, indeed, of no legal authority or usage contrary to this view, except the mere casual misapprehension — for such I deem it to have been — of Chancellor Walworth, referred to above.

[1] Hardenbergh *v.* Hardenbergh, 14 Cal. 654; Morrison *v.* Morrison, 20 Cal. 431. "Desertion," said Christian, J., in a Virginia case, following the expositions given in this work, "is a breach of matrimonial duty, and is composed first, of the actual breaking off of the

which the parties remove apart is great or small; except perhaps as illustrating, under some circumstances, in matter of evidence, their intent; for the criterion in all cases is the intent to abandon.[1]

§ 778. **Refusing Copula — Refusing to have Impediment removed.** — We have seen,[2] that, where one of the parties to a marriage refuses to consummate it by sexual intercourse; or even, according to some opinions, when the party having a physical impediment to the consummation, removable by a surgical operation, refuses to be operated upon; the marriage is not voidable on the ground of impotence. But whether the refusal in either of these cases, or the utter withdrawal, after consummation, of one of the parties from the matrimonial bed, without any withdrawal from general cohabitation, is a sufficient separation to sustain the suit for desertion, seems not to be entirely clear. In England, the suit for the restitution of conjugal rights could not, ordinarily at least, be maintained in such circumstances; for, observes Sir Christopher Robinson, "matrimonial intercourse may be broken off on considerations (of health, for instance, and there may be other) with which it is quite incompetent to this court to interfere."[3] Yet in England it is doubtful, whether the court would discharge a husband proceeded against in such a suit, until he had received his wife, not only to his habitation, but to the matrimonial bed.[4]

§ 778 *a*. **Continued.** — Since the last section was originally

matrimonial cohabitation, and secondly, an intent to desert in the mind of the offender. Both must combine to make a desertion complete. . . . . But it is equally obvious, and it follows from well settled principles of law, that when a separation and intent to desert are once shown, the same intent will be presumed to continue until the contrary appears." Bailey *v.* Bailey, 21 Gratt. 43, 47.

[1] Ahrenfeldt *v.* Ahrenfeldt, 1 Hoffman, 47; Gregory *v.* Pierce, 4 Met. 478.

[2] Ante, § 332.

[3] Orme *v.* Orme, 2 Add. Ec. 382, 2 Eng. Ec. 354; Forster *v.* Forster, 1 Hag. Con. 144, 154, 4 Eng. Ec. 358, 363.

[4] Orme *v.* Orme, supra. A writer in the London Law Magazine, vol. 50, p. 275, shows, that, by the canon law, from which the suit for the restitution of conjugal rights was derived, the court would compel carnal copulation; but he thinks the English tribunals have altered the rule on this point, for the purpose of relieving somewhat the asperities of a cruel and unjust proceeding, which he considers this suit to be. Where, in this suit, the husband is defendant, and is ordered to receive his wife home, he is bound to take the first step by inviting her to return to him. If he does not, an attachment against him will be issued. Alexander *v.* Alexander, 2 Swab. & T. 385.

written, some cases have arisen shedding some further light on the subject. Thus, in England, it has been adjudged in the divorce court that the refusal of a wife to accept the embraces of her husband is not alone sufficient to bar her claim for a judicial separation on the ground of his adultery and cruelty. Said the judge ordinary, "There is no doubt, after the case of Orme *v.* Orme,[1] that, although this court enforces conjugal cohabitation, it does not pretend to enforce marital intercourse. The reasons why it does not embark in such an attempt are sufficiently obvious. But on this very ground perhaps a complaint of this nature ought to receive its full weight as matter of recrimination. The matter here complained of ought to, and does oftentimes find a place in that general review of conjugal life which, on a question of cruelty or even of recrimination, is in such cases imposed on the court." But, standing quite alone, the learned judge deemed it not to be sufficient.[2] And the New Jersey court has held, that, though this sort of conduct is wrong in the wife, it does not justify the husband in deserting her.[3] In Massachusetts, the question came squarely before the court in a case where, during the statutory period for desertion to ripen into a ground for divorce from the bond of matrimony, a wife, taking offence because her husband permitted a son to enlist in the army, excluded him from her bed, declaring that she did not love him, she would have no more sons for him to send to the war, she did not think she should ever live with him again "as man and wife," and he was "nothing but a boarder." Thereupon the court held that this was not desertion, and denied the husband's prayer for divorce. Said Bigelow, C. J.: "The word desertion in the statute does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract." [4] We shall see, as we proceed with this chapter, that the term desertion does not,

[1] Orme *v.* Orme, 2 Add. Ec. 382.

[2] Rowe *v.* Rowe, 4 Swab. & T. 162, 163.

[3] Reid *v.* Reid, 6 C. E. Green, 331.

[4] Southwick *v.* Southwick, 97 Mass. 327, 328.

according to the concurring judgment of all the courts before which the question has come, as expressed in actual decision, mean what the learned judge in this extract assumes it to mean. On the other hand it may exist without "an abnegation of all the duties and obligations resulting from the marriage contract;" for, if a husband refuses to dwell in the same house with his wife, but supports her, this, all hold, amounts to desertion of her by him.[1] This doctrine has been expressly recognized in Massachusetts.[2] The duty of the husband to support his wife is one of the chief duties growing out of the contract of marriage. And the law has provided various means by which this duty is enforced. Matrimonial intercourse is another of the chief duties; the law deems it to be so important that it holds a marriage voidable which is entered into by a party having no physical capacity to perform it. Consequently it is nowhere true in matter of adjudged law, that desertion "involves an abnegation of all the duties and obligations resulting from the marriage contract."

§ 779. **Continued.** — Looking, then, at this question in the light of legal principle, and remembering that it is not necessary, in order to constitute desertion, that every obligation imposed by the marriage should be cast off, if, aside from all special or temporary considerations, as of health, a wife should utterly refuse to dwell with her husband as wife, why should not the refusal be deemed a desertion, even though she were willing to remain with him as a servant or a daughter? It is a familiar principle in the interpretation of statutes, that they are to be shaped and moulded to harmonize with the unwritten law.[3] As, therefore, the unwritten law makes the marriage voidable where from the time of its solemnization onward there is no power of copula, so the statute granting divorce for desertion puts it in the power of the party to have it dissolved when, without reason and maliciously, the other party refuses copula. By this interpretation, the statute and the common law are brought into harmony. And, in reason, if the ends of marriage are frustrate when there is no power of copula, much

[1] See, for example, Macdonald *v.* Macdonald, 4 Swab. & T. 242; Yeatman *v.* Yeatman, Law Rep. 1 P. & M. 489.

[2] Magrath *v.* Magrath, 103 Mass. 577.

[3] Bishop Stat. Crimes, § 114, 119, 124, 144.

more are they so when the same thing is wilfully and perpetually refused. And if the one, proceeding from a physical incapacity, and so not within the party's control, is a wrong demanding legal redress, much more is the other over which the party has control. In accord with this view, there is a case which holds, that a husband, who has already deserted his wife, cannot so take off the effect of the desertion as to prevent her right to a divorce accruing, by offering, a short time before the expiration of the period specified in the statute, to support her either *in his own house* or elsewhere. "The offer," said the court, "was not to live with her in the relation of husband and wife; and, as she was by the nature and terms of the marriage contract entitled to stand in that relation to him, she was not bound to accept the offer to stand in any other relation."[1] Indeed, for a husband to support his wife in his own house, while he denies her what is meant by marriage, is, for a reason suggested in another chapter,[2] not unfrequently a much greater wrong than to give her the means of support away. Still, as observed in the last section, it has been held, that, though the husband takes a separate bed from his wife, she is not thereby justified in leaving his house.[3] It is not always easy to harmonize differing and isolated legal propositions; but, as to the last, the true view undoubtedly would be, that, unless the taking of the separate bed had ripened into a statutory desertion by time, it would not justify her leaving his house; but, if it had, it would justify her, and likewise furnish ground for a divorce against him.

§ 780. **Continued — Joining the Shakers.** — A statute of New Hampshire provided, "that any husband or wife separating him or herself from the other, and joining and uniting him or herself with any religious sect or society that believes, or professes to believe, the relation between husband and wife void or unlawful, and such husband or wife continuing to live so united with such sect or society for the space of three years, and refusing during that time to cohabit with the other, who shall not have joined and continued united with such sect or

[1] Fishli *v.* Fishli, 2 Litt. 337. See also Moss *v.* Moss, 2 Ire. 55.

[2] Ante, § 738.

[3] Eshbach *v.* Eshbach, 11 Harris, Pa. 343.

society, shall be deemed and taken to be a sufficient cause of divorce from the bonds of matrimony." And in a suit by the wife, for the husband's desertion within this statute, the court held, "that the Shakers believe or profess to believe the relation between husband and wife void or unlawful;" the evidence being, that they acknowledge the husband's duty to maintain his wife, and hers to conduct herself in a discreet and seemly way in submission to her husband; and acknowledge generally the lawfulness of marriage, as to what were called in the case "all its duties which the laws can enforce. But," said the court, "the evidence shows, and it is not denied, that they also believe, or profess to believe, that cohabitation[1] is not one of the duties resulting from the relation of husband and wife; and that, with respect to the great end of matrimony, the continuation of the species, they hold the relation to be void and unlawful. We have therefore no hesitation in saying, that we think it clearly proved that the Shakers are a sect professing to believe the relation of husband and wife unlawful and void, within the meaning of the statute."[2]

§ 781. **Continued — The Scotch Law.** — For a gleam of remaining light, we may refer to the Scotch law. Fraser says: "The *diversion* justifying divorce has hitherto been confined to the case where the offender deserts the society of the other. Yet a question has been raised as to whether it would apply to the case of a party who occupies the same house with the pursuer, and the same bed, and yet refuses *conjunctionem corporum*, or at least to cohabit with the other *at bed and board*. Sir George Mackenzie refers to this question, and says, 'that it may be doubted if a wife, remaining in her husband's house, but refusing him all access to her, may be said to have deserted; and I conceive she may, for all the reasons in the one case conclude against the other.' Elchies also said, 'Truly I am of opinion, there is the same reason for dissolving a marriage for wilful abstinence as for non-adherence; though I am afraid our law would not sustain it, since it is not contained in the

[1] From the connection, and from other expressions in the report, it plainly appears that the court here use the word cohabitation in the sense of sexual intercourse. For instance, they say, the Shakers believe "that it is unlawful for man and wife to cohabit together as man and wife." See ante, § 777, note.

[2] Dyer *v.* Dyer, 5 N. H. 271.

act.' It would seem, however, that it is desertion. Marion Graham applied to the Commissaries, setting forth that George Buquhanane, her husband, 'put hir fra him, repelland hir of his cumpanie, and inclusit hir in ane chalmer in ye heid of his place of Buquhanane, and hes abstractit his bodie fra hir continewallie sinsyne, and haldin hir thairin inclusit, and will not put hir to libertie and freedom, and *adheir*, treit, and entertein hir at bed and buird.' Here the parties were living in the same house, yet the wife asked for adherence, and not judicial separation. The commissaries decerned him 'to adheir as an man aucht to do to his wyff.'"[1] And in a Scotch case before the House of Lords, this tribunal held, that, though the husband offers to aliment his wife in his own house, yet does not eat, sleep, or stay there with her, he does not so discharge the duty of adherence as to be exempt from liability in her suit for separate alimony.[2]

§ 782. **Continued.** — This question, as one of principle, is perhaps not quite without difficulty. Still, as reinforcing what is said in the foregoing sections it may be observed, that, if a party to the marriage should refuse to the other party whatever lawfully belongs in marriage alone, — refuse, not from considerations of health, not from any other temporary considerations, but from alienation of affection, from perverted religious notions, or from any other cause resting permanently in the will, and not in physical inability, — the refusing party would thereby voluntarily withdraw from whatever the relation of marriage, distinguished from every other relation subsisting between human beings, is understood to imply. Therefore he should be holden to desert thereby the other. Cases might arise wherein the proofs would fail; but, let it here be said again, as it has been more than once said in these pages, no just judge will suffer a cause to slip when clearly proved, because of any difficulty which parties may be supposed to encounter in proving other similar cases.[3]

[1] 1 Fras. Dom. Rel. 681. And see ib. 55.

[2] Arthur *v.* Gourlay, 2 Paton, 184. As to which point, however, see Gray *v.* Gray, 15 Ala. 779.

[3] And see, as favoring the views expressed in this section, Heermance *v.* James, 47 Barb. 120, 126, 127.

II. *The Intent to desert.*

§ 783. **General Doctrine — Consent — Necessary Absence.** — The matter oftenest arising for consideration in these cases is the intent to desert. A mere absence of the husband on business;[1] or a separation of the parties by mutual consent, made with[2] or without[3] the further understanding that one of them shall apply for a divorce; is plainly not desertion in either. Neither, as a question of evidence, can desertion be inferred against either, from the mere unaided fact of their not living together;[4] though protracted absence, with other circumstances, may in matter of evidence establish the original intent.[5]

§ 784. **Desertion commencing or not with Separation.** — The separation and desertion are neither necessarily in theory, nor always in the facts of the cases, identical in the time of their commencement. Thus, if a husband or wife leaves the matrimonial habitation for a temporary purpose, intending to return, but afterward resolves to remain away, the desertion begins at the time when this new purpose is formed.[6] And where parties had been living separate for a considerable period, and the cause of their separation did not appear, but the husband had contributed to his wife's support, he was held to have deserted her, at least from the time when he withdrew the support and wrote her a letter wherein, among other things, he said: "When, therefore, I now cease to give you any further means, it is only done until such time as you are ready for such settlement, which is to fix a sum for your entire mainte-

[1] Ex parte Aldridge, 1 Swab. & T. 88; Williams *v.* Williams, 3 Swab. & T. 547.

[2] Mansfield *v.* Mansfield, Wright, 284.

[3] Crow *v.* Crow, 23 Ala. 583; Gray *v.* Gray, 15 Ala. 779; Vanleer *v.* Vanleer, 1 Harris, Pa. 211; Ward *v.* Ward, 1 Swab. & T. 185; Fulton *v.* Fulton, 36 Missis. 517; McKay *v.* McKay, 6 Grant, U. C. Ch. 380; Buckmaster *v.* Buckmaster, Law Rep. 1 P. & M. 713; Lea *v.* Lea, 8 Allen, 418; Ingersoll *v.* Ingersoll, 13 Wright, Pa. 249.

[4] Jones *v.* Jones, 13 Ala. 145; Gaines *v.* Gaines, 9 B. Monr. 295, 303; Butler *v.* Butler, 1 Parsons, 329; Stokes *v.* Stokes, 1 Misso. 320; Scott *v.* Scott, Wright, 469; Pidge *v.* Pidge, 3 Met. 257, 258; Van Voorhees *v.* Van Voorhees, Wright, 636; McCoy *v.* McCoy, 3 Ind. 555; Cook *v.* Cook, 2 Beasley, 263; Jennings *v.* Jennings, 2 Beasley, 38.

[5] Ahrenfeldt *v.* Ahrenfeldt, 1 Hoffman, 47.

[6] Reed *v.* Reed, Wright, 224; Pinkhard *v.* Pinkhard, 14 Texas, 356; Conger *v.* Conger, 2 Beasley, 286.

nance and expenses, all in all, payable to you weekly, by a third person. . . . . Finally, I wish whatever settlement is made between us is to be done by a legal divorce. The tie is broken; and it is better for us to live as happy as possible separate, than to lead an unhappy life together, and show a bad example to our children."[1]

§ 784 *a*. **Continued.** — In apparent contradiction to a doctrine laid down in the last section, we have a dictum proceeding both from an English and an American judge. In an English case, the facts of which showed that there was no desertion according to any admissible view of them, Lord Penzance adopted a course of reasoning leading to this just conclusion, the effect of which, if the subject is not carefully examined, may be unfortunate. After admitting that the separation and desertion need not concur in point of time in cases where the separation was meant to be only temporary, he added, that such cases "have no analogy with a case in which a wife, who complains of desertion, has herself voluntarily ceased to live with her husband, and an actual separation has already occurred, not in obedience to any external necessity, but for the express purpose of avoiding continued intercourse," he proceeded: "I come, then, to the following conclusions as applicable to cases of this kind. No one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute 'desertion.' But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion' in my judgment becomes from that moment impossible to either, at least until their common life and home have been resumed. In the mean time either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to

[1] Ahrenfeldt *v.* Ahrenfeldt, 1 Hoffman, 47. And see Holston *v.* Holston, 23 Ala. 777.

enforce their resumption ; but such refusal cannot constitute the offence intended by the statute under the name of 'desertion without cause.' "[1] And in a Michigan case one of the learned judges observed: "If there be a separation by consent, that consent shows that the parties deem it no grievance to be deprived of each other's society, and nothing but an unconditional and entire resumption of their early relations can restore them to such a position as would make a new separation by the departure of the wife, as in this case, a criminal desertion."[2] Now, in England, this sort of doctrine is not as mischievous as it would be in this country; and it may even rest on a reason there which could not be made available here. There, after a separation is established, it may be put an end to by a suit for the restitution of conjugal rights; for not even an agreement under articles for a separation will bar this suit.[3] But here, where this suit is unknown, the doctrine would operate to render irrevocable a separation entered into, as our American courts hold, contrary to the policy of the law, and to make valid what all our tribunals are constantly holding to be void; since, as the reader perceives, after a separation has taken place, desertion according to this doctrine becomes impossible. The true view is, that, as laid down in substance in an English case, desertion, where the parties are apart, commences with the intent in the mind of the accused person permanently to abandon cohabitation with the other.[4] But if the parties have already separated by consent, or if the party complaining had in the first instance deserted the other, then, in order for the one to put the other in the wrong, there must be something more than a mere change of purpose, there must be an outward act; such as an overture, made in good faith, to which the other declines to respond. The act of desertion is an offence against the marriage; and, if one of the married parties is separated from the other without having committed an offence, — as, if the other has himself deserted, or has agreed to a separation, — it is impossible he should afterward be made guilty of the offence, unless he is, at least, made aware of

[1] Fitzgerald *v.* Fitzgerald, Law Rep. 1 P. & M. 694.

[2] Cooper *v.* Cooper, 17 Mich. 205, 210.

[3] Ante, § 634 et seq.

[4] Gatehouse *v.* Gatehouse, Law Rep. 1 P. & M. 331.

a change of wish and purpose in the other party. Without this, he cannot intend to desert. And what is thus stated as the better view, is believed to be established doctrine.[1]

§ 785. **Nature of the Intent to desert — Magnitude.** — Perhaps, if the intent were a tangible thing, which, like the stature of the person, could be accurately measured to an inch, there might arise some nice questions concerning the particular extent, in height or breadth, to which the intent must reach, in order to constitute the fully developed intent to desert. Must the deserting person mean, that, whatever prayers or entreaties may proceed from the other, such persuasions shall never bring back the feet which have departed? According to the United States Digest, one of the points decided in a Mississippi case was, that no absence can amount to a desertion unless accompanied by the *animus non revertendi*. But this point, if fairly embraced within the case, is certainly not very distinctly sustained by it.[2] It appears to have been held in an admiralty case, that, to constitute desertion under the general maritime law, there must be a quitting of the vessel with the intention of abandoning her altogether, and not returning. A mere leaving of the vessel without permission is not desertion.[3] The view which seems to the writer best sustained in principle and in the philosophy of the human mind is the following: A purpose to desert is one thing; a mental resolution not to change this purpose is another thing; and a determination to seem to desert, yet to return to the matrimonial cohabitation after this seeming has done its work, is still a third thing. The first of these, and this only, is meant when we speak of the intent to desert. If one of the matrimonial partners should leave the other, saying within himself, — "I do not like the squint of the eye which I see when I sit down to my dinner, I have protested against it and I do not believe it will ever be given up, therefore, by reason of the squint and the squint remaining, I utterly separate myself from the offending member," — this, it is submitted, would be a case of desertion, notwithstanding the apparent probability, that, should the squint cease, the intent to desert would cease with it. Yet there might be cases in which there

[1] Post, § 786.

[2] Fulton *v.* Fulton, 36 Missis. 517.

[3] The Rovena, Ware, 309.

would be great difficulty in distinguishing the intent to desert from the intent which comes short of this. Perhaps the criterion is to consider, whether the party charged with desertion contemplated the renewal of the cohabitation after a temporary separation should have served a temporary purpose, or whether the intent was to make the separation permanent.

§ 786. **Revocation of Consent — How Desertion constituted during Separation — How ended.** — A consent to a separation is a revocable act;[1] and, if parties separate by consent, and one of them afterward in good faith seeks a reconciliation, but the other refuses to return;[2] or, if they separate for cause, and the cause is removed, but one of them declines to renew the cohabitation;[3] or, if a wife having left her husband without cause comes back to him, and he will not receive her;[4] or, if the husband after deserting his wife proposes to renew the cohabitation, and she rejects his proposal, the full statutory period not having elapsed;[5] this is a desertion by the one refusing, from the time of the refusal. But to entitle a person to a divorce under such circumstances, the offer of return must be made in good faith, it must be free from improper qualifications and conditions, and it must be really intended to be carried out in its spirit if accepted.[6] And in all cases the legal desertion ends with the intent to desert; for instance, it ends when the erring party undertakes to come back, and is prevented. If the wife is restrained by her parents from rejoining her husband, the court, on proper application, will remove the restraint.[7]

[1] Crow *v.* Crow, 23 Ala. 583.

[2] Butler *v.* Butler, 1 Parsons, 329; Miller *v.* Miller, Saxton, 386; Cunningham *v.* Irwin, 7 S. & R. 247.

[3] Hills *v.* Hills, 6 Law Reporter, 174.

[4] Clement *v.* Mattison, 3 Rich. 93; Fellows *v.* Fellows, 31 Maine, 342; English *v.* English, 6 Grant, U. C. Ch. 580; Grove's Appeal, 1 Wright, Pa. 443, 446. And see McDermott's Appeal, 8 Watts & S. 251, 256; McGahay *v.* Williams, 12 Johns. 293; McCutchen *v.* McGahay, 11 Johns. 281; Hanberry *v.* Hanberry, 29 Ala. 719.

[5] Walker *v.* Laighton, 11 Fost. N. H. 111.

[6] Friend *v.* Friend, Wright, 639; Fishli *v.* Fishli, 2 Litt. 337; Fulton *v.* Fulton, 36 Missis. 517; 1 Fras. Dom. Rel. 686.

[7] Friend *v.* Friend, supra. People *v.* Mercein, 8 Paige, 47, 54. And see Rex *v.* Wiseman, 2 Smith, 617. All which the court can do, upon a *habeas corpus* in such a case, is to relieve the wife from any alleged restraint, and let her choose whether to rejoin her husband or not. In an English case it was observed by Lord Campbell: "This lady is living with her son by her own free consent, and is under no restraint whatever. Whether her husband can or cannot compel her return [in a suit for the restitution of conjugal rights,

§ 787. **Immaterial which one departs.** — Where the separation and desertion commence together, the deserting party is not necessarily the one who leaves the matrimonial habitation, but he is the one in whose mind the intent to desert exists. Thus, to drive away the wife from the house is to desert her.[1] And where a husband sent his wife to her friends; and then, without any known cause, himself left the country; there having been no difficulty between them, only it was supposed he thought her too old for him; she was held to have been deserted by him.[2] So where it appeared that the parties had some slight misunderstanding; and the husband, having been absent from home a day or two, returned, and told his wife to go and see her brother, sick at his residence a few miles distant, — she went, found her brother well, not having been sick; came back, found her husband gone, — she was held also to have been deserted by her husband.[3] Indeed, it would be difficult to draw any distinction, except in the enormity of the offence, between a husband's openly leaving his wife with the avowal of his intent to desert her, and his removing her from him by stratagem or by violence.[4]

§ 788. **Change of Domicil.** — The dwelling together of parties in marriage implies, of necessity, either that they concur as to the place of their abode, or that one of them determines where it shall be. But as differences of opinion and wishes are liable to arise between them, the law must intrust to one of the parties the authority to fix the place, and change it from time to time, when the concord of views which ought to subsist between persons so closely allied fails to do this. And the

which suit is unknown in the United States] is a question *alieni foro*. We have no jurisdiction on that subject. If this writ were to go, and the lady were to be produced before us in court, she would be at perfect liberty to return to her son as at present, if she so pleased, and we could make no order for her to live with her husband. If she has no good cause for being absent from him he may have a decree in the ecclesiastical court for her to return and live with him. The case of an infant, to which allusion has been made, is quite different; because there the parent has the right to the custody of the child, and if the infant is of tender years the court will order it to be delivered to its father. But a husband has no such right at common law to the custody of his wife." Ex parte Sandilands, 21 Law J. N. S. Q. B. 342, 343, 17 Jur. 317, 12 Eng. L. & Eq. 463. See also In re Price, 2 Fost. & F. 263.

[1] Morris *v.* Morris, 20 Ala. 168.

[2] St. John *v.* St. John, Wright, 211.

[3] Cossan *v.* Cossan, Wright, 147.

[4] See 2 Dane Ab. 308.

doctrine is familiar, that this authority is vested, by law, in the husband.[1] In a preceding section of this volume,[2] and in discussions which will occur in our second volume, the author has freely stated his objections to some of the English expositions of legal doctrine, which, taking their origin in times and manners differing from our own, seem to place in the hands of the husband too much arbitrary power to be fitly exercised in modern days, under the light of a more advanced civilization. But respecting the point of our present inquiry, reasons prevail unlike those which govern in the other questions referred to. Either the husband or the wife must decide, where there is insufficient good fellowship between them to lead to an agreement; and nature, as well as law, points to the husband, who is the stronger to protect, and to whose lot, more than the wife's, properly fall the struggles of life, as the proper party. The authority, in these and other like cases, must be either with the husband or the wife, it cannot be in the hands of both. And the concurrent judgment and instinct of mankind represent the husband under the similitude of the oak, and the wife under that of the vine, clinging to its bark, and graceful and lovely only while it clings. And if there were not differences between the mental and physical constitutions of men and women, and if the differences were not such as they are, nature could not recognize the existence of a law attracting sex to sex, by force of which the peculiar and perpetual union of marriage could subsist.

§ 789. **Continued.** — These observations are made, because, of late, some decisions have found way into the books, apparently overlooking and overruling what is thus stated to be established doctrine. Especially a Vermont case, wherein the opinion of the learned court was pronounced by its learned chief justice, seems to cut deeply down into the foundation itself of marriage as understood in our law. According to the facts of this case, the parties were married, and dwelt together for a time, in a particular place; then they removed into another State; then the husband came back to live in the former place; but the wife refused to accompany him back,

[1] See 1 Bishop Mar. Women, § 45–50.

[2] Ante, § 756.

refused also to join him after he had returned, because unwilling, she said, "to live with him near his relatives;" and the court held, that these facts did not constitute a "wilful desertion," within the statute, of him by her. Said Redfield, C. J.: "While we recognize fully the right of the husband to direct the affairs of his own house, and to determine the place of the abode of the family, and that it is in general the duty of the wife to submit to such determinations, it is still not an entirely arbitrary power which the husband exercises in these matters. He must exercise reason and discretion in regard to them. If there is any ground to conjecture, that the husband requires the wife to reside where her health or her comfort will be jeoparded, or even where she seriously believes such results will follow which will almost of necessity produce the effect, and it is only upon that ground that she separates from him, the court cannot regard her desertion as continued from mere wilfulness. . . . . And in the present case, as the wife alleges the vicinity of the husband's relatives as a reason why she cannot consent to come to Milton to live with him, and as every one at all experienced in such matters knows, that it is not uncommon for the female relatives of the husband to create, either intentionally or accidentally, disquietude in the mind of the wife, and thereby to destroy her comfort and health often, and as there is no attempt here to show that this is a simulated excuse, we must treat it as made in good faith; and, if so, we are not prepared to say that she is liable to be divorced for acting upon it."[1] There is also a late Pennsylvania case, in which the doctrine seems to find favor, though perhaps the case does not absolutely establish it, that, if a wife refuses to come with or follow her husband from a foreign country to this, such refusal alone, unaccompanied by evidence showing its unreasonableness, is not desertion by her.[2] And something like this has likewise been laid down in Wisconsin.[3]

[1] Powell *v.* Powell, 29 Vt. 148, 150.

[2] Bishop *v.* Bishop, 6 Casey, 412. It is noticeable how a little rhetoric will sometimes help a legal argument over a hard place. Thus it was said, in this case: "The woman had for

[3] Gleason *v.* Gleason, 4 Wis. 64; Hardenbergh *v.* Hardenbergh, 14 Cal. 654. See, as further illustrating this matter, Walker *v.* Laighton, 11 Fost. N. H. 111; Molony *v.* Molony, 2 Add. 249, 2 Eng. Ec. 291.

§ 790. **Continued.** — The general doctrine is plain, and the cases before referred to do not conflict with it, that, if a husband lawfully and properly undertakes to change the matrimonial residence, and the wife refuses, having no legal excuse, to proceed with him to the new locality, she thereby deserts him.[1] Doubtless if her health would not permit the removal, she would be justified in refusing;[2] because the very removing of her, to the injury of her health, would be legal cruelty. But the true reason of the law of marriage acknowledges no condition of living separate, without necessity and without consent, unless the law also gives the right of divorce when the living thus separate occurs.[3] For example, if the woman mentioned in the Vermont case should set up the fact of her husband's residing "near his relatives," as ground on which to ask for a divorce from him, there could be found no tribunal, however unfettered by statutory inhibition and lax in its notions of marriage, disposed to grant her prayer. And if this rule is not to prevail, but if in each case the judge is to extract from his own breast, or from among the tea-table fumes which arise where congregated beauty sips, the fluctuating rule for the case, in deciding whether the excuse of a deserting party is a sufficient justification of the desertion, the law may be said to sit very loosely upon our tribunals. This matter of excuse,

years followed the fortunes of her husband, — faithful in every thing, as the testimony shows, as well as his anxiety to have her accompany him to this country evinces, if he were sincere in it. At this point, however, and in the face of this great trial she fails! The leaving home and country, the dangers of a long ocean-voyage, the privations of a stranger in a strange land, may have overmastered her strong desire to follow his footsteps further, and determined her to cling to her native country." p. 415. Now, let us change the strain of rhetoric, and see how the argument looks: The man had toiled hard and long to support the wife whom he loved. He found, at last, that the only way to do this was to emigrate to the new world, and there enter the door to happiness, prosperity, and fortune! He begged of his wife to go with him, but she refused; he entreated her to follow on, but she would not. She loved his earnings, and was willing to endure his presence for the sake of receiving them in England; but she loved other English people, perhaps other men of England, better than she loved her husband; so she resolved to forsake him and cleave to them. See further, as to the Pennsylvania law, post, § 799; Cutler *v.* Cutler, 2 Brews. 511; Angier *v.* Angier, 7 Philad. 305.

[1] Walker *v.* Laighton, 11 Fost. N. H. 111; Hair *v.* Hair, 10 Rich. Eq. 163.

[2] See, as not however deciding the point, Molony *v.* Molony, 2 Add. 249, 2 Eng. Ec. 291. And see Keech *v.* Keech, Law Rep. 1 P. & M. 641.

[3] See post, § 796; ante, § 569–571.

however, comes up for consideration further on.[1] It may be observed, that, on the other hand, if the wife undertakes to change the matrimonial domicil, and the husband refuses to follow her, this is not a desertion of her by him.[2]

§ 791. **Innocent Party leaving for Cause.** — Suppose the cessation of the matrimonial dwelling together to be occasioned by the ill conduct — the sufficient ill conduct, according to the true legal standard — of one of the parties, can the party who is not in fault rely upon this as constituting a desertion by the other? Decisions in Connecticut,[3] North Carolina,[4] and perhaps some other States maintain, that, if a husband so abuses his wife as to render her living with him personally unsafe for her, on which account she leaves him, she can maintain against him her divorce suit, relying on these facts as amounting to desertion by him.[5] And it was observed by Bartol, J., in a Maryland case, that, "if a man fails to supply his wife with such necessaries and comforts of life as are within his reach, and by cruelty compels her to quit him, and seek shelter and protection elsewhere, we should have no hesitation in saying, it would be as much an abandonment of her by him as if he had deserted her and gone away himself."[6] In like manner the English courts hold, that, if a wife quits her husband's house under probable cause to apprehend personal violence from him, or by reason of his bringing a common woman to reside in it, this, in an action for necessaries, is equivalent to his turning her out of doors;[7] in other words, it is desertion by him. Indeed, as matter of evidence, as well as law, such conduct seems, upon principle, clearly to show his intent to desert, on the familiar rule,[8] that a man is presumed to intend

[1] Post, § 795 et seq.

[2] Frost *v.* Frost, 17 N. H. 251.

[3] 2 Dane Ab. 308; Reeve Dom. Rel. 207.

[4] Wood *v.* Wood, 5 Ire. 674.

[5] See also Almond *v.* Almond, 4 Rand, 662; Camp *v.* Camp, 18 Texas, 528.

[6] Levering *v.* Levering, 16 Md. 213, 219.

[7] Houliston *v.* Smyth, 2 Car. & P. 22, 3 Bing. 127, 10 J. B. Moore, 482; Hodges *v.* Hodges, 1 Esp. 441. And see Blowers *v.* Sturtevant, 4 Denio, 46.

[8] 1 Greenl. Ev. § 18, 34; 1 Bishop Crim. Proced. 2d ed. § 1060. And see Brown *v.* Commonwealth, 2 Leigh, 769. On an indictment for shooting with intent to murder, Patteson, J., in summing up to the jury, observed: "If it be necessary that the jury should be satisfied of the intent, I have no doubt that the circumstance, that it would have been a case of murder if death had ensued, would be, of itself, a good

the natural and probable consequences of his acts. And there can be no distinction made between his intending to oblige her to leave him, and intending himself to leave her. If, on the other hand, it should be affirmatively shown that a husband practising cruelty on his wife did not mean thereby to drive her from him, and really desired to have her remain, then the induction of the intent to desert would be repelled, and this conduct of his would not amount to a desertion of her.

§ 792. **Continued.** — Still the doctrine of the last section, supposing it to be sound in law, which undoubtedly it is, does not go to the full extent of an affirmative answer to the interrogatory with which the section opens. And unless there is ground to hold, either as matter of fact or of law, that the ill conduct was connected with a desire to be rid of the ill-treated party, even though it justifies such party in leaving, the case can hardly, in reason, be deemed one of desertion. This proposition seems to find an illustration in a case which arose in New Jersey, under a statute whereby wilful, continued, and obstinate desertion for five years was made a ground of divorce. The husband was lazy and would not work, and the wife for a long time supported him and the rest of the family by her own exertions. At length, still receiving no help from him, she removed to another place, and there took board and continued to reside during the requisite number of years, when she brought her suit for divorce. Her prayer was disallowed, the Chancellor observing: "A wife cannot convert a husband's not contributing to the support of a family into a desertion on his part, by removing to another place and taking board and refusing to receive him there. The case seems to be nothing more nor less than an application by the wife for a divorce on the ground that the husband is idle and contributes nothing to her support or that of the children, and that she is obliged to support herself and them, and is unwilling that her earnings should support him."[1] In some later New Jersey cases this question is further considered; and it is held, that, if a wife justifiably leaves her husband on account of his cruelty, this is not a desertion by

ground from which the jury might infer the intent; as every one must be taken to intend the necessary consequences of his own acts." Reg. *v.* Jones, 9 Car. & P. 258, 260.

[1] Lewis *v.* Lewis, 2 Halst. 22, 26.

her; but, if he practised the cruelty *for the purpose* of driving her away, it is a desertion of her by him.[1] Again, it was laid down in another case, that, if a husband drives his wife from his house, or inflicts on her such personal violence as to indicate an intention to drive her away, and she goes, he thereby deserts her.[2] Moreover he deserts her, if, while she is discharging her duties as wife, he maliciously refuses to permit her to share with him such means of livelihood as he has, and thus drives her from home. But, observed the learned chancellor, Zabriskie, speaking to the actual point in judgment, "By marriage, a wife agrees to share the fortunes of her husband, in poverty and sickness, as well as in affluence and health. She may be obliged to aid in her own support and be bound to adhere to him. And she is not, because he is poor and her lot uncomfortable, entitled to leave him and betake herself to the luxuries of the home of her father. Much less can this convert her unwarranted leaving her husband into a desertion by him."[3]

§ 793. **Continued.** — In Massachusetts it was laid down, under a statute now superseded, that, if a husband so abuses his wife as to furnish her justifiable cause to leave him, and she for this cause does leave him, and does neither return nor offer to return, while he wholly neglects to provide maintenance for her, and does not seek to live with her; this does not constitute a desertion of her by him. The case was one of severe cruelty, coupled with utter neglect by the husband to provide for the wife; which two delinquencies were, by the statutes of Massachusetts,[4] severally causes of divorce from bed and board; and it was agreed, that, for either one of these causes, at her election, she might have maintained her suit, even at an earlier period, for the limited divorce. But the majority of the court held, that she could not likewise elect[5] to consider his conduct as amounting to desertion; and, at the end of the statutory period from the time of the separation, bring a suit on this

[1] Marker *v.* Marker, 3 Stock. 256.

[2] To the like effect is Starkey *v.* Starkey, 6 C. E. Green, 135.

[3] Palmer *v.* Palmer, 7 C. E. Green, 88, 90.

[4] R. S. c. 76, § 6.

[5] The doctrine of a party's right to elect which of several remedies he will pursue, is so well established in both civil and criminal jurisprudence as to leave it hardly possible that the consideration mentioned in the report, of the plaintiff having her choice of other remedies, could have much weighed in the minds of the judges.

ground for a divorce from the bond of matrimony. Mr. Justice Putnam, dissenting, contended, that the case was the same as if the husband had turned his wife out of doors; that, there being a separation which was not compelled by any third person, it must have been either by mutual consent or a desertion; that it was not by mutual consent; that the wife did not desert the husband, the separation being without her fault; and, therefore, that he must be held to have deserted her.[1] "We confess," says a reviewer, "it seems to us extremely difficult to resist this conclusion."[2]

§ 794. **Continued.** — We may observe of this Massachusetts case, as it stands on the judgment of the majority, that the court seemed not to have its attention directed to the question whether, in point of evidence, the husband should be presumed to have intended to bring about the separation which his ill conduct made necessary for the safety of the wife. And in this view, plainly the result reached by the majority of the court is a departure from correct principle. Plainly, also, as a question of a somewhat different nature, the result of this case should have been as indicated by the dissenting judge; for, if a husband may drive away a wife by his cruelty, without being chargeable with deserting her, then the statute against desertion can operate only for the protection of the strong, not of the weak.[3] At the same time, the intent to desert must, as matter of real or assumed fact, exist in order to constitute legal desertion. It appears to the writer, that, when a question of this sort is tried by a jury, the case may be properly disposed of as follows. The judge should tell the jury, that, to constitute the desertion charged, the defendant must have intended to bring about the separation; but, in matter of evidence, if it appears that the husband voluntarily did what compelled the wife to leave him, they will be justified in inferring the intent from the conduct, because men usually mean to produce those results which naturally and necessarily flow from their actions.

[1] Pidge *v.* Pidge, 3 Met. 257. Something like this was likewise held in a Maryland case. Lynch *v.* Lynch, 33 Md. 328. As to Massachusetts, see also Fera *v.* Fera, 98 Mass. 155; Lea *v.* Lea, 99 Mass 493.

[2] 7 Boston Law Reporter, 19.

[3] The legislature has since remedied this error of construction, as see ante, § 773, note. And see, as lending some countenance to the doctrine of the text, Ward *v.* Ward, 1 Swab. & T. 185.

Still the jury are to judge, whether or not, upon all the facts appearing in evidence, it was so in this particular instance.

§ 794 *a*. **Driving Wife away.** — And thus we come to a common case about which there is no dispute; namely, that, if a husband, with or without bringing a false charge against his wife, drives her away from the matrimonial dwelling, he thereby deserts her.[1]

III. *The Justification.*

§ 795. **General View.** — Though a sufficient abandonment should be shown *prima facie*, still the case might be met by a resort to any of the principles to be hereafter discussed under the heads of Connivance, Collusion, Condonation, and Recrimination.[2] We also saw, under the head of Cruelty, that there is in law a defence to a charge of this nature, hardly coming under any one of the above heads; based on the principle that a man cannot complain when visited with the natural and probable consequences of his own act. If the cruelty under which a wife suffers, comes to her as the natural rebound of her own ill conduct, she cannot have redress in a court of justice; but her remedy is to mend her own manners.[3] So, in respect to desertion, Dewey, J., in a Massachusetts case, observed: "It might well be urged, and the appeal would meet a hearty response in every breast, that the husband who, by his brutal violence, or by a total, wilful neglect to cherish and sustain his wife, in accordance with his marriage vows, should compel her to abandon his roof and seek shelter abroad, either by way of protection of her person from violence, or for the purpose of obtaining the necessary comforts of life, should be estopped from setting up, in a court of justice, such withdrawing of the wife as a wilful desertion by her. To a husband seeking a divorce under such circumstances, it might well be said, your barbarity, your inhumanity, or your gross neglect (as the case might be) was the occasion of the separation of which you complain; your wife was only an involuntary actor in the scene, and you must be content to abide the consequences re-

[1] Kinsey *v.* Kinsey, 37 Ala. 393; Shrock *v.* Shrock, 4 Bush, 682; Grove's Appeal, 1 Wright, Pa. 443; Harding *v.* Harding, 22 Md. 337.

[2] Vol. II. § 4–102.

[3] Ante, § 764–768.

sulting from your own misconduct." [1] Yet to what extent the very just principle thus stated is applicable to the suit for desertion is not precisely clear. Plainly, if one of the married parties leaves the other for a justifiable cause, this suit cannot be maintained against him; but the question is, — What is a justifiable cause? And, again, the doctrine may be, — for here is a question, — that, though the party deserting is not properly justifiable, yet the other may still be debarred from complaining, by reason of his own evil conduct. Upon these questions it is difficult to lay down any propositions with entire confidence that they can be sustained by the authorities, whether they are sustainable in just legal argument or not. This matter has been mentioned in two several places before in this volume;[2] let us now further see what are some of the views which have been judicially entertained on this subject.

§ 796. **How in Principle.** — But before travelling through the authorities, let us look again at the question as one of principle. The general policy of the law is to keep the parties as much as possible together. Though the suit for the restitution of conjugal rights has not been adopted in our States, yet the divorce for desertion more than occupies its place, as expressing the general truth, that marriage and matrimonial cohabitation should dwell in conjunction, and not apart. And we have seen, that in still other forms also has the law given expression to the same truth.[3] Indeed, in every view, when two persons have entered into marriage, neither one of them should be permitted to end practically the relation, any more than to end it theoretically; for the theoretical relation, by which is meant the legal relation from which matrimonial cohabitation does not proceed, is not a thing to be favored either in law or in morals. That which gives a legitimate offspring to the country, and feeds the future to become strong in human population, wise in intelligence, beauteous in virtue, is not the theoretical marriage, which, so far from blessing the country, prevents actual marriage; but it is the actual abiding together of those who enter into wedlock. In marriage, also, each party

[1] Pidge *v.* Pidge, 3 Met. 257, 261; S. P. Smith *v.* Smith, 12 N. H. 80; Miller *v.* Miller, Saxton, 386; Butler *v.* Butler, 4 Litt. 201, 206; McCrocklin *v.* McCrocklin, 2 B. Monr. 370; Watkinson *v.* Watkinson, 12 B. Monr. 210.

[2] Ante, § 569–571, 790.

[3] Ante, § 635.

undertakes to overlook moral wrongs and infirmities in the other; and to continue the cohabitation, notwithstanding their existence. Suppose, then, the plaintiff in a divorce suit for desertion is shown to have some obliquities, how is the court to determine whether they are such as should legally justify the defendant in quitting the cohabitation, except as the court refers the question to the law, and inquires whether the law has made them ground for dissolving or suspending the marital relation? If each individual judge takes it into his own hand to determine that such or such a thing will justify a desertion, the thing not being known in the law as foundation for suspending or dissolving the marriage, then does the judge convert every actual marriage, in which this thing is found, into what we have called a theoretical one. He assumes to his office what is more, and what is worse, than fully to dissolve the marriage because of the existence of this thing.

§ 797. **Neglect of Means to gain the Affections — Fear of having Children — Commission of Crime.** — Proceeding now to look at what has been decided, let us call the attention of the reader to the cases already mentioned,[1] in which the courts permitted some light excuses to take off the effect, as desertion, of the wife's refusal to follow the husband when he made a change of his domicil. In Ohio, to quote the language of the report, "It appeared in proof, that, in 1827, the complainant, then about —— years old, was married to the defendant, then about fourteen years old. She was unwilling to marry him, and said she could never love him; but, by his procurement, she was *coerced* into the marriage. They lived together a few months, when she left him, went to her friends in Massachusetts, and refused to live with him longer. He treated her well while they were together, and once made an effort to induce her to return; she told him she had no affection for him, and never could live with him. He was cautioned, before the marriage, that he never would be happy in a marriage so procured, but persisted. *By the Court:* This man seems to have used undue and improper means to compel a child to marry him, against her own will and the advice of his friends; and now, while reaping the natural reward of his efforts, he has become dissatisfied and de-

[1] Ante, § 789.

sires a divorce. Without some more and decided attempts to gain the affections of his wife, and at reconciliation, we consider it our duty to deny him a divorce. Let the bill be dismissed."[1] In another case, however, the same court held, that the fear of having too many children will not so justify a wife in leaving her husband as to prevent him from obtaining a divorce for the desertion."[2] And the North Carolina court decided, that the husband's commission of a crime does not authorize the wife to leave him; since she took him "for better or for worse."[3]

§ 798. **Charge of Infidelity — Restitution of Conjugal Rights.** — A late Alabama case holds, that a wife does not "*voluntarily* leave her husband," within the meaning of the statute, when she goes away because of his bringing against her an unfounded charge of infidelity to his bed. Said the court: "We are far from saying, that this accusation is a ground upon which the defendant could have obtained a divorce from her husband. However groundless and cruel, it was not sufficient for that purpose. But our opinion from the evidence is, that it was the cause of her leaving and remaining from him unwillingly; hence, that she did not leave or remain away voluntarily, but under an unhappy necessity, which he created and continued." The court also considered, that the English decisions as to the defences in a suit for the restitution of conjugal rights do not apply to the question we are here discussing; because, in the English suit, the husband who is defendant is admonished to treat with conjugal kindness the wife whom he is directed to receive back.[4]

§ 799. **Cause justifying Divorce.** — But in Pennsylvania is established the plainer rule, that the "reasonable cause" which,

[1] Bigelow *v.* Bigelow, Wright, 416.

[2] Leavitt *v.* Leavitt, Wright, 719. And see Du Terreaux *v.* Du Terreaux, 1 Swab. & T. 555.

[3] Foy *v.* Foy, 13 Ire. 90.

[4] Hardin *v.* Hardin, 17 Ala. 250. See Kinsey *v.* Kinsey, 37 Ala 393. And see Gray *v.* Gray, 15 Ala. 779. A similar doctrine seems to have been laid down in Louisiana. Naulet *v.* Dubois, 6 La. An. 403. See also Gillinwaters *v.* Gillinwaters, 28 Misso. 60; People *v.* Mercein, 8 Paige, 47, 68. In New Jersey, something less than would furnish ground of divorce seems to be deemed adequate in excuse for a desertion, Laing *v.* Laing, 6 C. E. Green, 248. But, contra, Moores *v.* Moores, 1 C. E. Green, 275. At all events, a wife is not deemed to be justified in leaving her husband because his matrimonial intercourse with her is frequent, if he employs no compulsion and she has no physical infirmity.

within the divorce statutes of the State, will justify one of the married parties in leaving the other, must be such conduct as could be made the foundation of a judicial proceeding for divorce. The court considered, that a contrary construction would violate all true policy, render the law chaotic and uncertain, favor separations, and substitute the particular opinions of the judge happening to preside at the trial, in the place of well-defined legal principles.[1] It was observed in a later case in which the same doctrine was enforced: "We have adopted the same principle which rules in the English ecclesiastical courts. In that country, when cohabitation is suspended by either the husband or wife, of his or her own motion, without a sufficient reason, a suit for a restitution of conjugal rights may be maintained by the injured party. Nothing amounts to a bar against such a suit except such facts as would entitle the defendant to a divorce. Nothing short of such facts will justify a wilful separation or a continuance of it. The interests of society, the happiness of the parties, and the welfare of families, demand such a rule. Separation is not to be tolerated for light causes, and all causes are light which the law does not recognize as ground for the dissolution of the marriage bond."[2] Likewise it has been held by the highest court of Kentucky, that no ill conduct in the plaintiff, short of what would have constituted ground for divorce or for alimony, will so justify the defendant's desertion as to bar the suit.[3]

§ 800. **Mutual Fault.** — In New Hampshire it was observed, that there are "few cases" only, in which the desertion will be justified. But the court said: "We have already decided, that, where a husband horsewhipped his wife two or three times, her leaving him furnished no good cause for a divorce, notwithstanding her conduct could not be justified."[4] A reference to the reports shows the same wife to have been refused her divorce on the ground of this cruelty; because, although the husband was not justifiable, yet her conduct had been so outrageous as to bar her remedy.[5] So, in a suit for

[1] Butler *v.* Butler, 1 Parsons, 329; Eshback *v.* Eshback, 11 Harris, Pa. 343, 345; Cattison *v.* Cattison, 10 Harris, Pa. 275. And see Vanleer *v.* Vanleer, 1 Harris, Pa. 211.

[2] Grove's Appeal, 1 Wright, Pa. 443, 447, opinion by Strong, J.

[3] Logan *v.* Logan, 2 B. Monr. 142.

[4] Kimball *v.* Kimball, 13 N. H. 222.

[5] Poor *v.* Poor, 8 N. H. 307.

necessaries furnished the wife, her adultery is a bar, although the husband has committed adultery also.[1] Yet, if he has condoned her adultery, he cannot defend the suit for necessaries by setting up this adultery.[2]

§ 801. **Separation during Pendency of Divorce Suit.** — There are circumstances in which the law authorizes a party to the marriage to remain away from the other for some special or temporary purpose, though no divorce follows. A case like this, however, is regulated by the law, not by the private notion of a particular judge. Thus, in England, it is not malicious desertion for the husband to forsake cohabitation with his wife during the progress of his suit to obtain a decree of nullity of the marriage, notwithstanding the judgment in the suit should be against him. "During the pendency of that suit," says Sir John Nicholl, "cohabitation was not only not incumbent by law, on the parties, or on either of them; it would even have been legally censurable, at least in the husband."[3] And the same principle applies to divorce suits.[4] Therefore a withdrawal from the cohabitation, under such circumstances, is not deemed desertion.[5] "Nor," observed the Louisiana court, "is it an answer to this view to say, that, though he left the common dwelling early in June, he did not institute his suit until the 28th of October, inasmuch as the approaching summer vacations of the court would, in all probability, have prevented a trial; or it may be that the husband hoped, that, during this interval, the situation of his wife would prompt her mind to such reflections as would induce a change in respect to the habit complained of."[6]

§ 802. **Continued.** — The doctrine of the last section, though just as a general one, should probably have some limit in its application. Thus, if one of the married parties should leave the matrimonial cohabitation for some insufficient reason, and, having so left, should try the experiment of suing the other

[1] Govier *v.* Hancock, 6 T. R. 603; Rex *v.* Flintan, 1 B. & Ad. 227. See ante, § 574, 575.

[2] Harris *v.* Morris, 4 Esp. 41.

[3] Sullivan *v.* Sullivan, 2 Add. Ec. 299, 2 Eng. Ec. 314; Clowes *v.* Clowes, 9 Jur. 356.

[4] Sykes *v.* Halstead, 1 Sandf. 483; Edwards *v.* Green, 9 La. An. 317.

[5] Doyle *v.* Doyle, 26 Misso. 545; Simons *v.* Simons, 13 Texas, 468; Marsh *v.* Marsh, 1 McCarter, 315.

[6] Edwards *v.* Green, 9 La. An. 317.

for a divorce, probably, not certainly, the courts might hold the desertion to continue, notwithstanding the pendency of the suit. The difficulty in the way of stating this proposition with more confidence is, that, suppose the divorce suit to be something more than a mere intentional sham, its very pendency did of itself justify in law the absence of the party pursuing; and, where the absence is legally justifiable, though accompanied with the intent to desert, perhaps it may not constitute technical desertion. The point, however, appears not to have been adjudicated. The Missouri court, by Scott, J., stated the doctrine as follows: "Under color of maintaining a suit for a divorce, the husband would not be permitted to avoid the consequence of an abandonment and neglect to provide for his wife; but, when a suit is prosecuted in good faith for a divorce, nothing would be more unreasonable than to hold a separation from the wife during the pendency of such a suit a desertion, subjecting him to a suit for alimony."[1] In Texas also, the doctrine has been laid down in the same way.[2]

§ 803. **Imprisonment.** — In a Massachusetts case it was held, that the desertion was sufficient, though during the greater part of the statutory period the defendant husband had been confined, under successive sentences, in the house of correction for his crime. "We think," said the court, by Bigelow, J., "it was wilful. This is shown by the proof that it commenced before the defendant was imprisoned, and that during the intervals between his several commitments to the house of correction he neither returned to the society of his wife nor contributed any thing to her maintenance or support."[3] But here, the reader perceives, there was a continuing intent to desert, and the imprisonment did not prevent the renewing of the cohabitation, which would not have taken place if there had been no imprisonment. On the other hand, where, in Michigan, a wife was for a year held for trial on a charge by her husband of having attempted to take his life by poison, her absence was adjudged not to be, in law, desertion.[4]

§ 803 *a*. **Another View — Insanity.** — We shall see in the

[1] Doyle *v.* Doyle, 26 Misso. 545, 550.

[2] Simons *v.* Simons, 13 Texas, 468.

[3] Hews *v.* Hews, 7 Gray, 279.

[4] Porritt *v.* Porritt, 18 Mich. 420.

next volume, that, as matter of evidence, a desertion once shown is presumed to be continuing unless the contrary appears.[1] But there is an Iowa case which seems to carry this doctrine somewhat further. A statute provided that a wife should be entitled to a divorce from her husband "when he wilfully deserts his wife and absents himself without a reasonable cause for the space of two years." "The statute means," said Cole, J., "that, if the husband wilfully deserts his wife when she has not by her conduct given him a reasonable cause, and shall absent himself for two years when she has given him no reasonable cause for remaining away, then she shall be entitled to a divorce." Therefore the majority of the court held, that, if a man who is sane commits the original desertion, but before the full statutory period has run he becomes insane, and then the period elapses, his wife is entitled to a divorce.[2]

§ 804. **English Doctrine in Restitution of Conjugal Rights.** — In suits for the restitution of conjugal rights, the general doctrine requires the defendant to return to cohabitation, unless he shows in defence what will justify the court in decreeing a separation in his favor, if such is his prayer. And Dr. Lushington, in one case, said: "I know no authority which states, that, whatever be the guilt of both parties, if the court does not pronounce for a separation, they are not, according to the law of this country, bound to live together; and I think such a principle would be dangerous to society and the public morals."[3] But in a subsequent case this learned judge spoke of the question as being unsettled, and of great importance and difficulty. He observed, that, in former judgments, the possibility of dismissing both parties is mentioned, yet the cases permitting this must be rare.[4] It seems to have been

[1] Vol. II. § 672.

[2] Douglass *v.* Douglass, 31 Iowa, 421, 423.

[3] Anichini *v.* Anichini, 2 Curt. Ec. 210, 7 Eng. Ec. 85, 89. And see Oliver *v.* Oliver, 1 Hag. Con. 361, 4 Eng. Ec. 429; Barlee *v.* Barlee, 1 Add. Ec. 301, 305; Holmes *v.* Holmes, 2 Lee, 116, 6 Eng. Ec. 59; Westmeath *v.* Westmeath, 2 Hag. Ec. Supp. 1, 57, 4 Eng. Ec. 238, 264; D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, 784, 3 Eng. Ec. 329, 336. The same doctrine was rather taken for granted than decided in the Scotch case for adherence of Lang *v.* Lang, 13 Scotch Sess. Cas. N. S. 1108.

[4] Dysart *v.* Dysart, 1 Robertson, 106, 143. And see Molony *v.* Molony, 2 Add. Ec. 249, 2 Eng. Ec. 291; Moore *v.* Moore, 3 E. F. Moore, 84; Denniss *v.* Denniss, cited 3 Hag. Ec. 348, 353, 5 Eng. Ec. 135, 138; post, § 807.

intimated, that perhaps antenuptial incontinence in the wife may justify a subsequent desertion by the husband.[1] It appears also, that a wife, acting on the defensive in a suit for the restitution of conjugal rights, is not held to so strict proof of the charges offered in bar, as she would be in an original suit for divorce instituted by her on the same ground; though she is required satisfactorily to prove her allegations.[2]

§ 805. **Continued.** — But in a still later English case of this sort it was decided, that reasonable suspicion of adultery in the wife, where this offence is not actually shown to have existed, and the keeping of forbidden company by her, are not a sufficient answer, set up by the husband, to her suit against him for the restitution of conjugal rights. The decision was put, by the court, upon the broad ground taken by counsel, "that nothing can be pleaded in bar to a suit for restitution, but what would entitle the respondent to a judicial separation." And this doctrine was shown, by a manuscript decision dating back to 1727, as well as by later printed adjudications, to be the settled English law.[3] If, therefore, this rule of decision was deemed sound in England, at a time when judicial separations were allowed only for adultery and cruelty, much more should it be received as sound in this country, where the causes of separation and divorce are somewhat more extended.[4]

§ 805 *a*. **Husband supporting Wife.** — The duty of a husband to support his wife is, though important, not so completely of the essence of matrimony that its performance will take away the effect of a desertion. A husband owes to her his society and personal protection; and if, after refusing to live with her, he pays her an allowance, this will not, as we have seen,[5] serve as a defence to her suit for divorce on account of the desertion.[6] On the other hand, if the wife deserts the hus-

[1] Perrin *v.* Perrin, 1 Add. Ec. 1, 2 Eng. Ec. 11; Reeves *v.* Reeves, 2 Phillim. 125, 1 Eng. Ec. 208, 209.

[2] Bramwell *v.* Bramwell, 3 Hag. Ec. 618, 619, 5 Eng. Ec. 232, 233. And see Vol. II. § 89; Rogers Ec. Law, 2d ed. 897; 50 Lond. Law Mag. 275.

[3] Burroughs *v.* Burroughs, 2 Swab. & T. 303.

[4] And see Grove's Appeal, 1 Wright, Pa. 443, 447.

[5] Ante, § 778 *a*.

[6] Macdonald *v.* Macdonald, 4 Swab. & T. 242; Yeatman *v.* Yeatman, Law Rep. 1 P. & M. 489. See Nott *v.* Nott, Law Rep. 1 P. & M. 251.

band, then he makes her an allowance, the desertion still runs on in matter of law, the same as before.[1]

§ 805 *b*. **Articles of Separation.** — The effect of entering into articles of separation has been considered in some English cases; and it is held, that, if such articles are drawn up and fully executed, they amount to a consent to the living apart, and, if the writer correctly apprehends the doctrine, estop the party to allege a desertion contrary to the terms of the writing.[2] And, where a husband deserted his wife, but, before the statutory period had elapsed, a deed of separation was entered into between the husband, wife, and a trustee, and fully executed, yet he never paid any part of the allowance, it was held that she had bargained away her right, the desertion ceasing in law with the execution of the deed. It is to be observed that the deed contained, not merely a stipulation for her support, but in terms an undertaking on her part to live separate from the husband. "It is now suggested," said Lord Penzance, "that the court should inquire into what was intended by her when she executed the deed. It is clear that such evidence cannot be admitted. The question, then, is, whether a woman who voluntarily enters into an agreement that her husband shall live apart from her, can be said to have been deserted without just cause. I repeat the opinion I formed in Crabb *v.* Crabb,[3] that she cannot. There is a material difference between such a case as this and Nott *v.* Nott.[4] The *ratio decidendi* in Nott *v.* Nott was, that the wife never agreed to live separate and apart from the husband. The making of a deed was contemplated, and some of the parties executed it, but the party whose execution was to make it an efficient and binding agreement was the trustee who covenanted for the wife, and he never signed it, so that the deed was never completed. In this case the court is reluctantly obliged to

[1] Magrath *v.* Magrath, 103 Mass. 577. See Goldbeck *v.* Goldbeck, 3 C. E. Green, 42.

[2] Buckmaster *v.* Buckmaster, Law Rep. 1 P. & M. 713; Crabb *v.* Crabb, Law Rep. 1 P. & M. 601; Anquez *v.* Anquez, Law Rep. 1 P. & M. 176.

[3] Crabb *v.* Crabb, supra.

[4] Nott *v.* Nott, Law Rep. 1 P. & M. 251. In this case it appeared, that, after the husband had deserted the wife, she made him a weekly allowance to prevent his starving, but did not consent to his staying away. The two signed a separation deed, but it was never fully executed. It was held that the desertion was established.

hold, that the wife has bargained away her right to relief on the ground of desertion, and that the charge of desertion without cause for two years is not established."[1] It has been intimated, however, that if a husband who has determined to abandon his wife, induces her by a mere fraudulent show of an agreement which he intends never to fulfil, to consent to a separation, this is not a consent which he can avail himself of on a charge of desertion afterward brought by her.[2] And this doctrine stands well on the principle of the law, that fraud vitiates every thing into which it enters.[3] So, if parties living together enter into a deed of separation which is never acted upon, and afterward one of them deserts the other, this is no bar to a divorce for the desertion. "The court cannot," it was observed, "contrary to the manifest fact, consider the bare existence of this deed as a proof that these parties separated by mutual consent."[4] In an earlier chapter of this volume the reader will find a discussion of the question, whether, if parties who are supposed to contemplate marriage use words importing a present consent to matrimony, while in fact they do not mean it, or words not coming up to this import while in fact they do mean present marriage, the law will judge of the effect according to what they mean or according to what they say. And the result is, in substance, that the real meaning will be regarded in spite of the words.[5] To the writer it seems plain that the same doctrine ought to be applied here. We should remember, that, as already shown in these pages,[6] a mere agreement to live separate has, *as such*, no effect in the law whatever. Therefore, whatever be the terms employed in articles of separation, since the part in which the husband and wife in form consent to live separate is a mere nullity in the law, it cannot act as an estoppel, and the rules which govern valid contracts can have no necessary application to it. As mere *prima facie* evidence showing intent, such matter is properly admissible; but the real intentions and

[1] Parkinson *v.* Parkinson, Law Rep. 2 P. & M. 25, 26, 27.

[2] Crabb *v.* Crabb, supra.

[3] Bishop First Book, § 66-69, 124, 125.

[4] Cock *v.* Cock, 3 Swab. & T. 514.

[5] Ante, § 233 et seq.

[6] Ante, § 631, 635-637.

motives of the parties ought to be open to inquiry notwithstanding.[1]

§ 806. **Articles of Separation, continued — Separation for Cause — Refusal to renew a Cohabitation.** — As one illustration showing the nullity of the agreement to live separate, articles of separation are, as we have seen,[2] no bar to a suit for the restitution of conjugal rights, even though they contain a covenant not to bring the suit.[3] Thence it follows, that, if after the execution of such articles, one of the parties applies to the other in good faith for a renewal of the cohabitation, and is refused, this refusal will amount to a desertion, sustaining the suit for divorce.[4] And where a woman had left her husband because of his extreme intemperance, but he afterward reformed, offered her a good home, and invited her to return, which she declined to do, Judge Wilde held, that, assuming she was justified in leaving him, her subsequent refusal to return, on the cause being removed, was a desertion on her part, for which he could maintain his suit. It could not be the intent of the law to bind a man for ever to the consequences of an early fault, curable in its nature, and cured in fact.[5] So, also, where a husband and his wife, Protestants, had both joined the communion of the Church of Rome, and had both taken vows of chastity, and a *quasi* sentence of separation had been pronounced between them by the authorities of the church; after which he became a priest, and she a nun; it was held, that the husband was not thereby barred of his suit

[1] See post, § 810; Vol. II. § 25.

[2] Ante, § 634.

[3] Smith *v.* Smith, 2 Hag. Ec. Supp. 44, note, 4 Eng. Ec. 258; Westmeath *v.* Westmeath, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238; Barlee *v.* Barlee, 1 Add. Ec. 301, 305; Nash *v.* Nash, 1 Hag. Con. 140, 4 Eng. Ec. 357; Mortimer *v.* Mortimer, 2 Hag. Con. 310, 318, 4 Eng. Ec. 543, 547; ante, § 300, note. And see Cartwright *v.* Cartwright, 19 Eng. L. & Eq. 46.

[4] Miller *v.* Miller, Saxton, 386. A deed of separation seems to furnish no bar to a suit for alimony. Ib. It is no bar to a suit for divorce. Rogers *v.* Rogers, 4 Paige, 516. But in Brown *v.* Brown, 5 Gill, 249, 2 Md. Ch. 316, it was held, that, if a party seeks a divorce from bed and board, and there are articles of separation which leave the parties substantially where the decree of the court would leave them, he cannot obtain the useless relief. This doctrine is without other authority, and it probably rests on no sufficient foundation of principle; for no articles of separation can have the effect, even substantially, of a decree of divorce from bed and board.

[5] Hills *v.* Hills, 6 Law Reporter, 174, a Massachusetts case. Drunkenness in this State is not a cause of divorce. See ante, § 786. See also Walker *v.* Laighton, 11 Fost. N. H. 111.

for the restitution of conjugal rights.[1] Doubtless, therefore, the refusal of a party under like circumstances to renew the cohabitation, would in law be an act of desertion. The ground upon which all such cases proceed appears to be, that any separation, without legal sentence, for causes approved by law, is contrary to sound policy; and that, if a party has once consented to it, he may change his wrongful consent, and do right by revoking it at pleasure.

§ 807. **Both Parties separating for Cause — Mutual Guilt.** — The question may arise, whether, or not, suppose each of the parties to have committed an offence — for instance, adultery — authorizing, if there was no plea of recrimination, a divorce at the suit of the other party; and then suppose, that, both being thus guilty, one of them desires to renew the matrimonial cohabitation, and the other refuses, — is this a case of desertion on the part of the refusing one? In England, if, in such a case, there were a suit for the restitution of conjugal rights, the prayer of the complainant would be disallowed. So, at least, it was held by the judge ordinary in a late case; though the canon law was admitted to be the other way.[2] And an earlier Irish case, not made public at the time of this decision, maintains the doctrine of the canon law.[3] This matter, however, will be further illumined when we treat of the subject of recrimination.

§ 808. **Law and Evidence distinguished — Consent, &c.** — We have already sufficiently seen, that, where the party complaining had consented to the desertion, the divorce on this ground cannot be allowed.[4] And in an Alabama case it was observed by Chilton, J.: "If a husband leave the wife without the intention of returning, to entitle her to a divorce she must not, by her conduct, have driven him from her society, and have continuously denied him the *locus penitentiæ*, and the privilege of returning; for, in that event, we must intend the separation was by her consent, in which case she is not entitled to a

[1] Connelly *v.* Connelly, 16 Law Times R. 45, 7 Notes Cas. 444, 2 Robertson, 201, 2 Eng. L. & Eq. 570.

[2] Hope *v.* Hope, 1 Swab. & T. 94. And see ante, § 800, 804.

[3] Seaver *v.* Seaver, 2 Swab. & T. 665. So held by Dr. Radcliff, in the Consistorial Court of Dublin, affirmed by the Court of Delegates in Ireland on appeal.

[4] Ante, § 783; Simpson *v.* Simpson, 31 Misso. 24; Thompson *v.* Thompson, 1 Swab. & T. 231.

divorce."[1] The matter which we have been considering through most of the sections of the present sub-title is, not what is the evidence of a consent to a desertion, but what, in law, will justify the desertion. Ill-conduct in one of the parties, falling short of what would authorize a divorce at the suit of the other, may, as a matter of evidence, establish consent in such party, — but questions of evidence are not for the present chapter.

IV. *The Continuity of the Desertion.*

§ 809. **Temporary Suspension of Desertion.** — The statutes which authorize the divorce from the bond of matrimony for desertion require the desertion to have continued through a specified number of years in order to be sufficient. In like manner, provision was made for naturalizing aliens who should have resided in this country, to use the words of the statute, "for the continued term of five years next preceding, &c., without being, at any time during the said five years, out of the territory of the United States." And it was held, that, where the alien had been, during the five years, some two or three minutes only in Upper Canada, without the intention of remaining, he was still barred of his claim to naturalization.[2]

§ 810. **Continued — Offer to return.** — So, in the matrimonial law, where a desertion is by any of the ways known to the law put an end to, for however brief a period, the earlier and later desertion cannot be yoked, and counted in years, together.[3] An offer to return, made in good faith during the statutory period, will put an end to the desertion, and bar the suit.[4] If the desertion has continued the number of years required by the statute, the deserted party may then refuse to renew the cohabitation; and this refusal will not bar the already existing right.[5] But if the number of years required

[1] Gray *v.* Gray, 15 Ala. 779, 784, 785; S. P. Gillinwaters *v.* Gillinwaters, 28 Misso. 60.

[2] Ex parte Paul, 7 Hill, N. Y. 56.

[3] Ex parte Aldridge, 1 Swab. & T. 88; Gaillard *v.* Gaillard, 23 Missis. 152. See McCraney *v.* McCraney, 5 Iowa, 232.

[4] Friend *v.* Friend, Wright, 639; Gaillard *v.* Gaillard, 23 Missis. 152; 1 Fras. Dom. Rel. 686; Walker *v.* Laighton, 11 Fost. N. H. 111.

[5] Cargill *v.* Cargill, 1 Swab. & T. 235; Basing *v.* Basing, 3 Swab. & T. 516; Benkert *v.* Benkert, 32 Cal. 467; Fishli *v.* Fishli, 2 Litt. 337; Hesler *v.*

has not elapsed, the refusal works the opposite result, and the refusing party cannot afterward have a divorce for the desertion.[1] A question has been made, whether a voluntary separation, entered into by articles, after the right of suit has accrued, will not bar the remedy.[2] But that is, perhaps in a measure, considered in a previous section.[3]

V. *The Distinction between the Law and the Evidence.*

§ 811. **General Views.** — The cases have not hitherto furnished us with matter appropriate to the present sub-title. Until they do, let the following suggestion suffice: It is a question of law for the court, whether there must be any, and what, separation of the persons of the parties from each other, — what must be the intent of the deserting party, — what, either of outward conduct, or of intent, in the other party, will bar such party's right to take advantage of the desertion, — how long the desertion must continue, and whether a particular fact, if admitted, has broken the continuity; but it is for the jury to decide, whether the personal absence of the parties from each other has existed, — whether the required intent existed, — whether the excusing acts and intentions existed, — and so on, of the rest. There is no great room for legal difficulty under this head.

Hesler, Wright, 210; 1 Fras. Dom. Rel. 686. "The statute," it was observed by Lord Corehouse, in a Scotch case, "gives the remedy for four years' 'malicious and obstinate desertion.' That remedy was meant to be effectual. The statute provides, that, after the lapse of four years, and the adoption of certain prescribed procedure, the party deserted shall have a right to obtain a divorce. If such party had not a *jus quæsitum*, such as could not be defeated at the option of the deserter by a subsequent tender of adherence, the remedy of the statute would be quite inoperative. A deserter might just repeat such a tender as often as a new course of desertion was run, and the proceedings against him had reached their present stage, so that the statute would be abortive." Murray *v.* McLauchlan, 1 Scotch Sess. Cas. N. S. 294. See also Hanberry *v.* Hanberry, 29 Ala. 719.

[1] Brookes *v.* Brookes, 1 Swab. & T. 326; ante, § 786.

[2] Jones *v.* Jones, 13 Ala. 145; Brown *v.* Brown, 5 Gill, 249, 2 Md. Ch. 316; ante, § 806, note.

[3] Ante, § 805 *b*.

CHAPTER XLV.

OTHER SPECIFIC CAUSES OF DIVORCE.

§ 812. **Introductory View.** — The three titles of Adultery, Cruelty, and Desertion, which occupied us through the last three chapters, are the leading ones under the present general division. But in several of our States other causes of divorce are allowed; and such of them as have furnished matter for judicial discussion will be mentioned here. And the reader will notice, how few decisions these other causes have furnished in all, — a fact plainly showing, that the extension of the remedy of divorce beyond the three common heads has not been found, thus far, to operate practically to undo the marriage bond to any great extent.

§ 813. *Habitual Drunkenness:* —

Doctrine stated. — In some of our States, it is a ground of divorce for a party to "become an habitual drunkard,"[1] or to be guilty of "habitual intemperance,"[2] or the like; for the particular terms of the statutes differ. Yet generally it is required that this offence, like desertion, shall have continued a specified number of years to furnish ground for dissolving the marriage.[3] The author has shown, in another connection, what

[1] Porritt *v.* Porritt, 16 Mich. 140.

[2] Burns *v.* Burns, 13 Fla. 369, 376.

[3] In Louisiana, the husband's habitual intemperance entitles the wife to a divorce from bed and board; but not from the bond of matrimony until two years after the separation from bed and board. Leake *v.* Linton, 6 La. An. 262. See, as to Maine, Curtis *v.* Hobart, 41 Maine, 230, 232; as to Il-

are the nature and limits of this offence, and the meaning of the various terms employed to denote or define it, as it is known in the criminal law.[1] What amounts to habitual drunkenness is a question of law; therefore, on the hearing of the libel for divorce, it is not sufficient for the witnesses to testify, in general terms, that the defendant is an habitual drunkard, but they should state particular facts and circumstances, leaving the court to judge of their sufficiency.[2] It has been held in California, that, to constitute "habitual intemperance," within the meaning of the statute, the party need not be at all times incapable of attending to business. "If," said Norton, J., "there is a fixed habit of drinking to excess, to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance, — although the person may at intervals be in a condition to attend to his business affairs."[3] The immoderate use of opium, though it may operate substantially the same as of alcoholic liquors, is not intemperance within the meaning of a statute of this kind.[4] And it is the same of chloroform.[5]

§ 813 *a*. **Origin of the Habit — Complaining Party.** — The words of the Michigan statute are, "shall have become an habitual drunkard." And it has been held, that, if a woman marries a man whom she knows to be already an habitual drunkard, she cannot have a divorce for a continuation of the habit. In a case where the complaining woman married knowing the facts, Christiancy, J., observed: "We think the defendant must have become an habitual drunkard after the marriage;" leaving undecided the question how it would be if she were deceived, and supposed the man to be of sober habits.[6] We have seen,[7] that, if a man marries a common prostitute, she is presumed to undertake to reform her habits according to the marriage vow, and, if she does not, but commits adultery after-

linois, Harman *v.* Harman, 16 Ill. 85; as to Arkansas, Rose *v.* Rose, 4 Eng. 507.

[1] Bishop Stat. Crimes, § 967–981.

[2] Batchelder *v.* Batchelder, 14 N. H. 380.

[3] Mahone *v.* Mahone, 19 Cal. 626, 628.

[4] Barber *v.* Barber, 14 Law Reporter, 375.

[5] Bishop Stat. Crimes, § 972.

[6] Porritt *v.* Porritt, 16 Mich. 140.

[7] Ante, § 179 and note.

ward, he is entitled to have a divorce for it as in other cases. But this Michigan statute is peculiar in its terms; or, if it were not, perhaps the same result would flow from the principle that the woman by making the marriage contract with one whom she knew to be a drunkard waived the objection; and that a drunkard does not, in marriage, agree to abandon drink, as a strumpet when she marries agrees to confine herself to the one man. To the writer, however, it seems, that, contemplating a case in which the terms of the statute are general, and not peculiar, as in Michigan, all parties who marry agree by the very act of marriage not to commit afterward any offence which the law has made ground of divorce; the consequencc of which would be, that the Michigan doctrine should not be accepted in States the statutes of which are in the ordinary and general terms.

§ 814. *Drunkenness coupled with Wasting of Estate:* —

Doctrine stated. — In Kentucky, a divorce may be granted for a "confirmed habit of drunkenness, on the part of the husband, of not less than one year's duration, accompanied with a wasting of his estate, and without any suitable provision for the maintenance of his wife and children." And it has been held, that, to bring a case within this statute, there is no necessity for the husband to possess actual real or personal property, provided he possesses the physical and mental ability to support himself and family by his labor. Said Stites, J.: "'Wasting of his estate,' where he has no property, should be deemed to apply to and embrace a man's health, time, and labor, all of which, for the purpose of supporting himself and family, are essentially his estate." And he observed of the contrary construction, that it "would operate sorely in cases similar to the present, where the application for divorce has been deferred by the wife, with the fond but vain hope of reformation, until, after the entire estate has been squandered, she is constrained, for the protection of herself and her children, to ask the protection of the law."[1]

§ 815. *Gross Neglect of Duty:* —

Duration of the Neglect. — Gross neglect of duty is ground of divorce in some of the States. Mr. Page says: "It is under-

[1] McKay *v.* McKay, 18 B. Monr. 8.

stood, that the Supreme Court of Ohio require that gross neglect of duty should continue for three years, in order to entitle the other party to a divorce. It is presumed that the legislature did not contemplate any shorter period as a sufficient cause; since they require, that wilful absence, which is a total neglect of all the duties of the marriage contract, in order to furnish a ground of divorce, should be persisted in for three years. Any other construction would be inconsistent with the manifest intent of the legislature." [1]

§ 816. **Illustrations of the Neglect.** — The same writer, in illustration of this matrimonial offence, states the following case, decided by the Ohio Court of Common Pleas. The wife was the offending party; she at first deserted her husband, without reason, against his urgent entreaties. After some months she returned, saying "she would make her husband's house a hell." Proceeding to execute this threat, she refused to perform domestic duties, refused to attend to the affairs of the household; and exhibited a furious and ungovernable temper, under the influence of which, upon slight provocation, she destroyed the furniture, and committed acts of violence upon husband and children. A divorce was decreed.[2] In another case, this gross neglect was held not to be made out against the husband, where the evidence was, that the parties quarrelled, he abused the wife; then they were reconciled and lived together; afterward they divided their furniture and separated, at which he expressed regret, — being, in the language of a witness, "a mean, drunken, idle, do-no-good fellow;" after which he committed acts of adultery.[3]

§ 817. *Husband having the Ability but refusing to maintain Wife:* —

Husband's Ability — Nature of the Neglect. — In Vermont it is a ground of divorce from the bond of matrimony, and in Massachusetts it was formerly so from bed and board,[4] for a "husband, being of sufficient ability to maintain his wife, grossly, wantonly, or cruelly to neglect or refuse so to do;" and similar

[1] Page on Div. 170.

[2] K. *v.* K., Page on Div. 171.

[3] Thorp *v.* Thorp, Wright, 763.

[4] At present, divorces from bed and board are abolished in Massachusetts, and for them divorces from the bond of matrimony are substituted, but made to operate for a limited period like divorces from bed and board. Stat. 1870, § 404.

provisions exist in some of the other States. Under this statute, the complaining wife must produce to the court some evidence of the husband's ability.[1] And in a Vermont suit, "the proof," says the report, "presented an ordinary case of wilful desertion. In denying the bill, the court so remarked; and further intimated, in the present, as it did in some other cases arising under the same statute, in the course of this circuit, that, in order to grant a bill for the cause here alleged, something more must be shown than a mere desertion of the wife by the husband, although he were of ample ability to maintain her, and refused her any aid in that respect. The terms, 'grossly, wantonly, and cruelly,' &c., although not very definite, must not be considered wholly insignificant. The legislature did intend a new cause of divorce; and the court could not regard it as synonymous with that of wilful desertion, where *three* years are required, and here only *one* year."[2] In another case "the facts were in substance, that the petitioner was in feeble health, and had two children, of whom the petitionee was the father. The petitionee was without property, but was able, by his labor, to support his family;" yet abandoned them, and refused to render them any assistance whatever. The court, on the same grounds as in the last case, denied her prayer for divorce.[3] But where the husband had appropriated to himself the whole property of the wife, amounting to a considerable sum, and then abandoned her, leaving her no means of support, refusing also to provide for her, the divorce was granted.[4]

§ 817 *a*. **Continued.** — In a Massachusetts case it was held, that the mere neglect of a husband to provide maintenance for his wife and children during a period of fifteen years, while she supported herself and them from her own earnings, there being no circumstances of aggravation, does not authorize a divorce for this cause. "The neglect," observed Colt, J., "must be 'gross or wanton and cruel' on his part, he being of sufficient ability to provide. These words were used for the purpose of giving to the conduct of the husband, in this respect, the character which they imply, and not to be disregarded."[5]

[1] Harteau *v.* Harteau, 14 Pick. 181.
[2] Mandigo *v.* Mandigo, 15 Vt. 786.
[3] Jennings *v.* Jennings, 16 Vt. 607.
[4] Hurlburt *v.* Hurlburt, 14 Vt. 561.
[5] Peabody *v.* Peabody, 104 Mass. 195, 197.

§ 818. **How in California.** — In California there is a statute providing for a divorce "for wilful neglect on the part of the husband to provide for his wife the common necessaries of life, having the ability to provide the same, for the period of three years." [1] And upon this it was decided, that the wilful neglect need not be accompanied with desertion. The judge also observed, that the ability must consist in actual property, as distinguished from the mere physical and mental capacity to earn money. Concerning the neglect he said: It "must be such as leaves the wife destitute of the common necessaries of life, or such as would leave her destitute but for the charity of others. If those common necessaries are provided by the earnings of either husband or wife, there is no such wilful neglect as is contemplated by the statute. The earnings of both go into a common fund, and become common property, the control and disposition of which belong to the husband; and, when applied by him or with his assent for her support, and are sufficient for that purpose, there is no basis for a decree, and the application must fail. In the present case, the earnings of the plaintiff were sufficient for her support, and were applied for that purpose, and it does not appear that the defendant ever exercised control over them, or interfered with their use." The facts which were, therefore, held to be insufficient are thus stated by the judge: "It appears from the testimony that the parties were married several years ago, and lived together until about eleven months preceding the application; that the defendant is an able-bodied man, a seaman by occupation, of idle habits, and an occasional tippler; that he has not made any provision for the support of his wife for the last four years, but that during this period she has supported herself by her own earnings; and that, in the opinion of the witnesses, he might have obtained employment as a first or second officer of a ship, at wages from forty to eighty dollars per month." [2] This California decision, however, proceeded much upon the respect which the judges had for some New Hampshire decisions, about to be considered.

§ 819. **How in New Hampshire.** — The reader will note, that

[1] Comp. Laws, p. 372.

[2] Washburn *v.* Washburn, 9 Cal. 475, opinion by Field, J.

the various statutes we are considering differ in their terms. Consequently it may be presumed that the interpretations of them should differ. The New Hampshire statute authorizes a divorce from the bond of matrimony, "where the husband shall have willingly absented himself from the wife for the space of three years together, without making suitable provision for her support and maintenance." [1] This provision is quite unlike the Vermont and Massachusetts ones, where the neglect must be "cruel," "gross," "wanton," and the like. But the court, in construing it, illustrated the maxim, *Viperini est expositio quæ corrodit viscera textus.*[2] For it held it to be insufficient for a wife to prove the husband's ability at the time of his abandonment of her; she must also affirmatively show, that the same continued during the entire three years.[3] Neither was it enough for him to have health and capacity to earn money; he must have "actually had property sufficient to enable him to make such provision." [4] And when a wife presented her claim, who, besides proving the desertion and a distinct refusal to support her, proved also, that the husband, continuing to reside in the same town with her, had an abundance of property during the entire three years, the court declined to give the divorce; because she could have got trusted on his account for necessaries, and he, having turned her off without cause, would have been compelled to pay the bills. "The statute," said the court, "intended such an absence as to leave the wife without the means of compelling the husband to provide for her support." [5]

§ 820. **How in Legal Principle.** — In the last three sections are presented several questions of much interest. One is, whether actual property of the husband's ownership is necessary, under a right construction of the statutes referred to, as part foundation for the divorce. The Kentucky court, we have seen,[6] has held it not to be necessary, under a similar statute

[1] R. S. c. 148, § 3.

[2] 11 Co. 34.

[3] Fellows *v.* Fellows, 8 N. H. 160.

[4] Mary F. *v.* Samuel F., 1 N. H. 198; Fellows *v.* Fellows, supra. In a late case, however, the judge observes, that the husband must have "some available property, or the avails of his own labor, at least, which he had refused or neglected to appropriate for her maintenance." Davis *v.* Davis, 37 N. H. 191.

[5] Cram *v.* Cram, 6 N. H. 87.

[6] Ante, § 813.

in Kentucky. And we shall see in its proper place, that alimony, though understood to be a share of the husband's estate, is to be based as well on his earnings and capacity to earn, as on his actual property; and that it may be decreed when he has no property beyond what lies in his hands and brain.[1] That this is the true view, and that this view should control the interpretation of the statutes now under consideration, are propositions which result from the plainest principles of justice. Man was not sent into the world to rust in idleness, but to work. A lazy man, whether he has property or not, is a curse to the country, a curse to the world. When a woman unites her fortunes with a man, in the way of marriage, she does not give herself solely to his property, but to his soul and to his body also. And to construe any statute which can fairly be made to recognize this principle as being repugnant to it, is, it is submitted, to violate all just rule.

§ 821. **Continued.** — But the view taken by the California court, that the woman's earnings are to be considered in connection with the man's, is plainly just. Yet the further view of this court, that the statute is not to be construed as applying while she succeeds in getting her living from her own fingers alone, and he refuses to help, is plainly unjust. The New Hampshire doctrine, that, if the woman and man remain in the same town, and his property is there also, after his desertion and during its continuance and his refusal to provide, she must be cut off from her divorce, on the ground of her common-law right to use his credit provided she can find persons who will give the credit and run their chance of collecting the bill of him at the end of a lawsuit, — is a wide departure from well-known principles, pervading our entire jurisprudence.[2]

§ 822. *Uniting with Shakers:* —

Doctrine stated. — In another connection,[3] was somewhat considered the offence of uniting and continuing with a society that believes the relation of husband and wife to be unlawful, as a ground of divorce. We saw that the Shakers are held to

[1] Vol. II. § 446.

[2] And see Ahrenfeldt *v.* Ahrenfeldt, 1 Hoffman, 47, decided under a similar New York statute; Johnson *v.* Johnson, 4 Wis. 135, under a similar Wisconsin statute; Hooper *v.* Hooper, 19 Misso. 355, under a similar Missouri statute.

[3] Ante, § 780.

be such a society, within the meaning of this statute.[1] Where a husband and his wife both united with the Shakers, but he afterward withdrew from them, and she refused to withdraw, he was adjudged to be entitled to his divorce at the end of the statutory period. Said Bellows, J.: "The fact that both had once assented to become members of such society makes it none the less the policy of the law that they should resume their marital relations; and, if one ceases to be a member, and desires to have those relations restored, we see no reason why a refusal to return to them should not have the same effect as if the applicant had never joined such society."[2]

§ 823. *Conviction for Crime:* —

Doctrine stated. — In some of the States, it is ground of divorce for a married party to be convicted of crime and sentenced to imprisonment for a specified number of years.[3] If the terms of the statute are general, it would seem to follow from familiar principles of interpretation that they should be held to refer only to a domestic conviction, — that is, a conviction under the authority of the State in which the statute is enacted, — and not to one under a foreign jurisdiction.[4] And this point was so adjudged in Tennessee; but the court rested its decision on the particular terms of the Tennessee statute, and the learned judge who delivered the opinion seemed to regard it as contrary to what should be the doctrine on general principles.[5] In New Hampshire the words of the statute are general, "conviction of crime and actual imprisonment in the State prison;" and there the court has held, that, if the conviction was in the district court of the United States for the district of Massachusetts, and the imprisonment under the conviction is in the Massachusetts State prison, the New Hampshire tribunal is not therefore authorized to grant a divorce.[6] The Delaware enactment settles this point by its own terms; thus, it provides that a divorce may be decreed from bed and board or the bond of matrimony, at the discretion of the court, "for," among other things, "conviction, either in or out

[1] Dyer *v.* Dyer, 5 N. H. 271.
[2] Fitts *v.* Fitts, 46 N. H. 184, 185.
[3] Johnson *v.* Johnson, Walk. Mich. 309; Utsler *v.* Utsler, Wright, Ohio, 627; Page on Div. 178.
[4] Ante, § 306; Bishop Stat. Crimes, § 141.
[5] Klutts *v.* Klutts, 5 Sneed, 423.
[6] Martin *v.* Martin, 47 N. H. 52.

of this State, after marriage, of a crime by the laws of this State deemed felony, whether such crime shall be perpetrated before or after such marriage."[1] If there is an apparent discrepancy between the record of conviction and the libel for divorce, in respect of the name, — as, if in the one it is *Nathan* and in the other *Nathaniel*, — parol evidence is admissible to show that both names denote the same individual, or that the names are understood to be the same in the neighborhood where the defendant resides.[2]

§ 824. *Absent and not heard of:* —

Doctrine stated. — It is a cause of divorce in New Hampshire for a married party to be absent three years together, without being "*heard of.*" And this offence has been held not to be sufficiently established in proof where it is simply shown, that, during the statutory period, the defendant has not been "heard *from;*" since the latter expression, according to the understanding of most witnesses, refers to some direct personal communication, by letter or otherwise, and there may have been no such communication, yet, in some other way, he may have been heard of. Evidence, also, should be produced from the friends of the absent party, or some reason should be assigned for its non-production.[3] In Connecticut, an absence of seven years, and the party not heard of, is a ground of divorce; which absence, says the court, "implies no injury, but is evidence of the death of the absent party."[4] And Judge Reeve observes: "It has been holden, that it is not necessary that a divorce should be had to entitle the party to marry again, the law proceeding upon the ground that the person so not heard of for seven years is dead."[5] Plainly, however, if one should without a divorce contract in good faith a second marriage after the lapse of this period, and the absent party should be shown afterward to be living, such second marriage would be null. On the other hand, if there were no statute on the subject, but the question were left to the decision of the unwritten law, death would be presumed after an absence of seven years, or even after a shorter absence;[6] then, if the absent party

[1] Stat. of 1859, c. 638.
[2] Utsler *v.* Utsler, supra.
[3] Fellows *v.* Fellows, 8 N. H. 160.
[4] Benton *v.* Benton, 1 Day, 111.
[5] Reeve Dom. Rel. 206.
[6] Ante, § 453–456.

were not shown to be alive, the marriage would be practically good. Yet, if, under this statute, the absence had continued for seven years, and then there had been a divorce for the cause of this absence, the second marriage would be valid, whether the absent one were truly living or dead.[1] The proposition, therefore, that no divorce in such circumstances is necessary, is calculated to mislead.

§ 824 *a*. *Gross Misbehavior and Wickedness:* —

What it is. — The Rhode Island statute authorizes a divorce for "gross misbehavior and wickedness, repugnant to and inconsistent with the marriage contract." And it has been held, that, if a husband and a woman other than his wife have become daily companions, and have each avowed for the other entire affection, yet if they have not been otherwise criminal in their association, this alone does not entitle the wife to the statutory remedy.[2]

§ 825. *Desertion and Living in Adultery:* —

Doctrine stated. — We have already seen something of this matrimonial offence.[3] In North Carolina, a divorce *a vinculo* may be decreed in favor of an injured party, from whom the other "has separated him or herself, and is living in adultery." Under this statute there must be, first, a desertion: thus, if a husband tells his wife he will not thereafter receive her as wife, and upon this she leaves him and lives in adultery, he cannot have a divorce; because there is, in law, no desertion by her.[4] Secondly, there must be a living in adultery. This must have occurred subsequently to the desertion.[5] We have seen,[6] that, according to the Louisiana doctrine, it is not necessary that the offence should be continuing at the time when the suit is brought; but, under this North Carolina statute, the court seem to deem such continuance to be essential. The necessity for the adultery to be subsequent to the desertion comes not alone from the particular language of the statute, but it proceeds also from the doctrine of condonation, whereby the right of the party to complain of the offence, if it were known to him,

[1] See ante, § 452, 583.

[2] Stevens *v.* Stevens, 8 R. I. 557.

[3] Ante, § 707.

[4] Moss *v.* Moss, 2 Ire. 55; Foy *v.* Foy, 13 Ire. 90; Morris *v.* Morris, 20 Ala. 168. As to which, however, see Houlston *v.* Houlston, 23 Ala. 777; ante, § 787.

[5] Hansley *v.* Hansley, 10 Ire. 506.

[6] Ante, § 707.

would be barred by subsequent cohabitation. But the court apparently intimate something more than this; "for the law," said Ruffin, C. J., "does not mean to dissolve the bonds of matrimony, and exclude one of the parties from marriage, until there is no just ground to hope for a reconciliation. For that reason, a divorce of that kind is denied when the parties give such evidence of the probability of a reconciliation as to continue to live together. And even when there is a separation, if the offending party should reform forthwith, and lead a pure life afterward, the law does not look upon it as hopeless, and reconciliation may in time follow the reformation."[1] A like statutory provision exists in Alabama[2] and in some of the other States.

§ 826. *Offering Indignities:* —

Doctrine stated. — In some of the States it is made ground of divorce, at the suit of the wife, for the husband to "offer such indignities to her person as to render her condition intolerable and her life burdensome." There are even statutes which make the offence mutual; and so give the husband the corresponding remedy when the wife offers, in like manner, indignities to him. Under this provision, the Missouri court once held, that an unfounded charge of adultery, brought by the husband against his wife, constitutes a sufficient foundation for the divorce.[3] The North Carolina court has also laid down substantially the same doctrine.[4] But the Missouri court, after deciding as thus stated, reversed in a subsequent case this doctrine, chiefly on the ground that indignities to the "person" (the word used in the statute) are not indigni-

[1] Hansley *v.* Hansley, supra.

[2] Morris *v.* Morris, 20 Ala. 168; Houlston *v.* Houlston, 23 Ala. 777. As to what, in the criminal law, it is, to "live together in adultery," see The State *v.* Glaze, 9 Ala. 283; Cameron *v.* The State, 14 Ala. 546; Collins *v.* The State, 14 Ala. 608; Belcher *v.* The State, 8 Humph. 63; Bishop Stat. Crimes, § 695 et seq.

[3] Cheatham *v.* Cheatham, 10 Misso. 296.

[4] Coble *v.* Coble, 2 Jones Eq. 392, Battle, J., observing: "An indignity to the person may be offered without striking the body, or even touching it in a rude and offensive manner. Contumelious words, especially when accompanied with a contemptuous demeanor towards a person, may amount to an indignity which would be felt by a sensitive mind with far keener anguish than would be inflicted by a blow. And what, to a virtuous woman, can be more contumelious than a charge made by her husband of infidelity to her marriage vow?"

ties to the mind, and that the charge of adultery is of the latter kind.[1] Afterward, in 1849, the Missouri legislature interfered, and made it cause of divorce for either party to "offer such indignities *to the other* as shall render his or her condition intolerable." The court held, under the latter statute, that it is not sufficient for the husband to write to the wife an expression of his determination not to live with her more; saying also, she does not suit him, he was deceived in her, her conduct toward his relatives has been improper; and to post a notice to all persons not to trust her on his account. Said Gamble, J.: "It is impossible to lay down any rules that will apply to all cases, in determining what indignities are grounds of divorce because they render the condition of the injured party intolerable. The habits and feelings of different persons differ so much, that treatment which would produce the deepest distress with one would make but a slight impression upon the feelings of another. It is impossible, therefore, under the statute, to specify particular acts as the indignities for which divorces may, in all cases, be granted; for it is not possible to state the effect of such acts in rendering the condition of all persons injured intolerable. The legislature chose to leave the subject at large, and, by the general words employed, evidently designed to leave each case to be determined according to its own peculiar circumstances. In the present case, the conduct of the husband, in writing the letter to his wife, appears to be a wanton act of cruelty, but it was confined to her, and not published to the world; . . . . . it was but the expression of his determination to abandon her without giving any decent pretext for the act."[2] Conduct, to constitute indignities within the statute, need not be such as to endanger the wife's life.[3] Some of the cases cited under the title Cruelty were adjudications under this class of enactments; and the reader is, for these cases, and various points applicable to this cause of divorce, referred to that title.[4]

[1] Lewis *v.* Lewis, 5 Misso. 278.

[2] Hooper *v.* Hooper, 19 Misso. 355. See also Bowers *v.* Bowers, 19 Misso. 351; Rose *v.* Rose, 4 Eng. 507, 516; Shell *v.* Shell, 2 Sneed, 716.

[3] May *v.* May, 12 Smith, Pa. 206.

[4] See more particularly ante, § 722, note, 726, 745.

CHAPTER XLVI.

THE DISCRETION OF THE COURT.

§ 827. **General View.** — We saw, in one of the introductory chapters of this work, something concerning the history and policy of the law of divorce. And it there appeared, that differing views upon this subject have hitherto prevailed among legislators and judges.[1] But whatever views are adopted, if any liberty of divorce is given, plainly there will arise cases falling completely within the equity of the divorce law, yet not sufficiently within the letter to enable the tribunals to interfere. Whether the difficulty is one which necessarily adheres to the subject, or whether in the nature of the case there is a remedy which is not generally recognized, may be matter of speculation and belief. An attempt has been made, in the legislation of some of our States, to supply the defect. The method is the following: The statutes, after enumerating particular causes of divorce, add, in a separate clause, that the court may also grant the divorce in all other cases appearing to be just, beneficial to the public, and so on; the words differing in different States. In Maine, the early Revised Statutes provided for divorce for a variety of specific causes; afterward the general clause just mentioned was introduced as an additional provision; and, in 1850, all specific causes were abolished, and in place of them it was enacted that, "in the trial of all libels for divorce, pending, or hereafter to be commenced, the libellant . . . . may allege and prove any facts tending to show that the divorce would be reasonable and proper, conducive to domestic harmony, for the good of the parties, and consistent with the peace and morality of society."[2] The Revised Statutes of 1857 contained, instead of particular mention of matrimonial offences justifying the dissolution of

[1] Ante, § 21 et seq.

[2] Stat. 1850, c. 171, § 2. And see Stat. 1849, c. 116, and Stat. 1847, c. 13; Anonymous, 27 Maine, 563; Ricker *v.* Ricker, 29 Maine, 281; Small *v.* Small, 31 Maine, 493; Motley *v.* Motley, 31 Maine, 490.

marriage, the general enunciation, that "a divorce from the bonds of matrimony may be decreed by any justice of the Supreme Judicial Court, ... when, in the exercise of a sound discretion, he deems it reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society."[1] The Revised Statutes of 1871 are in like terms; but they also specially authorize a divorce from the bond of matrimony in cases of desertion, and a divorce from bed and board for some specified offences.[2]

§ 828. **Reason for this Legislation.** — Probably one of the motives prompting to this kind of legislation has been an expectation, that the general discretion committed thus to the courts will prevent the legislature from being burdened with applications for special divorces. Yet if it tends to disencumber the legislative department of the government, it does not the judicial. And Chancellor Kent has well said, that the "vast power and discretion" given by these statutes to the judges must prove "exceedingly embarrassing and painful in the exercise."[3]

§ 829. **Proposed Legislative Substitute — Interpretation of Foregoing Provision.** — If it were within the province of one who is rather to illustrate and make plain what is, than to suggest what should be, the author would propose, for the consideration of law-makers, the following, as a substitute for this sort of provision. Let the statutes enumerate such specific causes of divorce as are deemed to be universally expedient. The legislature should bear in mind that the courts will, without special direction, limit the operation of these causes by those bounds which the principles of the unwritten law have drawn; so that, for example, if the party complaining is also guilty of the same thing as the defendant, he cannot have the divorce, however completely the defendant's conduct is within the statutory words. Let the specific enumeration cover the whole ground of what, as thus explained, is universally expedient. Then let a provision be added to the following effect: "Whereas, in the developments of future events, cases may be presented before the courts, falling substantially within the spirit of the

[1] R. S. of 1857, c. 60, § 2.
[2] Maine R. S. of 1871, c. 60.
[3] 2 Kent Com. 105, note.

law as hereinbefore stated, yet not within its terms, it is enacted, that, whenever the judge who hears a cause for divorce deems the case to be within the reason of the law, within the general mischief which the law is intended to remedy, or within what it may be presumed would have been provided against by the legislature establishing the foregoing causes of divorce, had it foreseen the specific case, and found language to meet it without including cases not within the same reason, he shall grant the divorce." Perhaps the general clause under consideration in this chapter should be interpreted to have the same meaning as the clause proposed; but, however this may be, the proposed clause would leave the matter plainly as it should be left for judicial action, in distinction from legislative. And however it might be construed and applied by the courts, whether more or less strictly, it would never be held to permit a judge to grant a divorce merely because his own private opinion was favorable to letting parties loose when they wished to be unloosed; while, on the other hand, it would sometimes prompt even the most iron-hearted judge to relax a stern rule, to meet the call of a particular equity.

§ 830. **Interpretation, continued — Judicial Discretion — Constitutional — Appeal.** — We have no decisions concerning the interpretation of this general clause, where it stands entirely alone, as it lately did in Maine, without any expression of the legislative will concerning specific causes. But where it stands connected with specific causes,[1] it is illuminated somewhat by judicial determination. One point apparently settled is, that the discretion is not an arbitrary one, such as guides the legislative bodies in enacting laws; but a judicial discretion, appropriate to a judicial tribunal.[2] The author in another con-

[1] Ante, § 827.

[2] Scroggins *v.* Scroggins, 3 Dev. 535; Barden *v.* Barden, 3 Dev. 548; Ritter *v.* Ritter, 5 Blackf. 81. "In all cases where by law, whether statute or common law, a subject is referred to the discretion of the court, that must be regarded as a *sound discretion*, to be exercised according to the circumstances of each particular case." Daniel, J., in Commonwealth *v.* Wyatt, 6 Rand. 694, 701. "Discretion," it is said in Coke's Reports, "is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colorable glosses and pretences, and not to do according to their wills and private affections." Rooke's Case, 5 Co. 99 *b*, 100 *a*. And see Keighley's Case, 10 Co. 139 *a*, 140 *a*; ante, § 307 *a*; Vol. II. § 82.

nection undertook to state what is meant by a judicial discretion; thus, — "This expression does not imply a power in each individual judge to do what he likes; but perhaps it may be defined to denote a sort of individual liberty, a sort of liberty in the collective judges, and an adherence to legal principles, blended in such a way as shall constitute an established course of justice, bending to the circumstances of cases, instead of requiring the cases to bend to it."[1] "The statute," observed the Indiana court, "requires a *cause* for divorce, on which the discretion of the court is to be exercised;" and then must follow "the conclusion of the judgment that the cause is reasonable, and such a one as forfeits the marriage contract on the part of the wrongdoer." This power, "like all other discretionary power in courts, must be exercised in a sound and legal manner; it must not be governed by caprice or prejudice, or wild and visionary notions with regard to the marriage institution, but should be so directed as to conduce to domestic harmony, and the peace and morality of society." The enactment was, therefore, held not to be unconstitutional, as vesting in the courts legislative authority; also the supposed improper exercise of the discretion, by the court below, was held to be legal matter for appeal.[2]

§ 831. **The Discretion, continued.** — And in North Carolina, Ruffin, J., observed: "I cannot suppose that the discretion conferred is a mere personal one, whether wild or sober; but must, from the nature of things, be confined to the cases for which provision was before made by law, or to *those of a like kind;*" for the provision implies, that there are proper causes besides the ones specified. "We cannot," he continues, "intend that the meaning was, that the court should grant divorces where under like circumstances the legislature had or might be expected to grant them by statute; for the contrary is implied by commanding the action of courts, — usually regulated by fixed rules. The court is, then, obliged to adopt the middle course, and prescribe to itself such principles as we think sound

[1] 1 Bishop Mar. Women, § 676.

[2] Ritter *v.* Ritter, supra, opinion by Dewey, J. Still, as to the appeal, a very clear case must be made out to justify a reversal of the discretion exercised by the lower judge. Ruby *v.* Ruby, 29 Ind. 174.

lawgivers, who allow of divorces at all, would send as rescripts to a judiciary."[1]

§ 832. **Continued — Peace and Harmony.** — In Iowa, where the statute authorizes a divorce when it appears, "that the parties cannot live together in peace and harmony, and that their welfare requires a separation," Wright, C. J., observed: "It was the province and duty of the court to judge what was, and was not, proved; and it is immaterial how much or how strongly the defendant may admit the sufficiency of the proof. The public has an interest in these cases, and the parties cannot be their own judges, but the court decides where so many interests are involved."[2] Under this statute it has been deemed incumbent on the court to consider the moral, the social, and the mental well-being of the parties, in distinction from their mere pecuniary interests, and to consider somewhat the welfare of the children. In one case, where a divorce was granted on the prayer of the wife, the following facts seem to be those which principally influenced the court. The husband's "harsh language," said Wright, C. J., "has been oft repeated, increasing in severity up to the time of their separation, in December, 1854. Nothing like personal violence is pretended, but instances of abusive language, quite as well calculated to destroy the peace of the family, and disturb its happiness. Not only so, but we are satisfied that these parties cannot live together in peace and happiness, from the fact that the wife, not without just cause [though the proof was not deemed to be judicially sufficient to authorize a divorce for adultery], labors under the conviction that the husband has been guilty of adulterous intercourse with other women, and this conviction or impression he has never for a moment attempted to remove."[3]

§ 833. **Continued.** — If we adopt the interpretation suggested a few sections back,[4] we have there as plain a judicial rule as the nature of this peculiar jurisdiction admits. If we do not adopt that interpretation, then evidently we can only commend the courts to the rules which they may suppose would guide the legislature, or ought to guide it, were the particular appli-

[1] Scroggins *v.* Scroggins, 3 Dev. 535.

[2] Lyster *v.* Lyster, 1 Iowa, 130.

[3] Inskeep *v.* Inskeep, 5 Iowa, 204, 217.

[4] Ante, § 829.

cation made to its discretion. That a legislature acts blindly — or, rather, that in theory it so acts, however it may sometimes proceed when the storm of passion is on, or when ignorance rules the hour, or when, what is worse than ignorance, party prejudice rules — is a mistake. All good legislators hold themselves as bound by established principles. Those principles may not be so clearly ascertained, or in their nature so capable of accurate definition, as are the rules which bind the courts; yet, to the extent to which they are definite, their grasp is as firm. The result of which is, that, in any view, a judge is not empowered to act arbitrarily, or from motives or views peculiar to himself, in these cases.

§ 834. **Continued — Desertion — Several Imperfect Causes united — Opium.** — Where, in Maine, the former Revised Statutes prescribed certain specific causes of divorce, and a subsequent statute added this general clause, the latter was construed to repeal no existing laws, but only to authorize divorce for causes not before "provided for by law." Therefore the court deemed itself not authorized to grant a divorce for desertion continued during a less period,[1] or for cruelty less severe,[2] than the Revised Statutes had prescribed. The like rule was followed in Illinois, where the general clause, somewhat different in its words, is a part of the same statute which enumerates the specific causes.[3] In Connecticut, where the statute authorized divorces for drunkenness, among other specific things; also for any misconduct of the respondent which would permanently destroy the happiness of the petitioner, and defeat the purposes of the marriage; the habitual and immoderate use of opium was held to be such misconduct;[4] a decision, it will be observed, quite in harmony with the principles laid down in North Carolina.[5]

§ 835. **Continued — General Views — Combination of Things.** — In a Maine case,[6] Shepley, C. J., pronouncing judgment of

[1] Anonymous, 27 Maine, 563; Ricker *v.* Ricker, 29 Maine, 281; Small *v.* Small, 31 Maine, 493; Motley *v.* Motley, 31 Maine, 490. For the present law of Maine, see ante, § 827.

[2] Elwell *v.* Elwell, 32 Maine, 337.

[3] Birkby *v.* Birkby, 15 Ill. 120. And see Hamaker *v.* Hamaker, 18 Ill. 137.

[4] Barber *v.* Barber, 14 Law Reporter, 375.

[5] Ante, § 831.

[6] Before the act of 1850, c. 171, ante, § 827.

divorce under this general clause, said: "The discretionary power, conferred by the law of 1849, is extremely broad, but it has limits. It is to be exercised only when conducive to domestic harmony, and consistent with the peace and morality of society. What, then, are the cases or the classes of cases in which the power can be properly exercised? Suppose the case of a party who had been for three years a common drunkard. In such a case, the law gives a *right* to a divorce. That law is an exposition of the discretion of the legislature upon the subject. Could this court set up *its* discretion above that of the legislature, and decide that it would require proof of four years' habitual drunkenness? Or that it would be satisfied with proof of two years'? We think the discretion of the legislature a safe standard as to every cause of divorce for which they have made provision. But there may be cases for which the former laws did not provide; such, for instance, as the co-existence of several of the prescribed causes, though neither of them has continued so long as to be, of itself, a sufficient ground of divorce. Such cases come within the discretionary power conferred by the act of 1849. For them the Revised Statutes furnish no guide, and have indicated no standard. In this case of Motley's [the one before the court], there is a combination of wrongs; there is habitual drunkenness; there is extreme cruelty towards the libellant, so that her personal safety is endangered; and there is desertion." (But by the Revised Statutes of Maine, the second of these causes was ground only for divorce from bed and board; and, in the case the learned judge was considering, the first and third had not sufficiently matured by time.) "For either of these wrongs, the law makes an appropriate provision, but it is silent as to a combination of them. That combination brings the case within the statute of 1849. We are, therefore, now called upon to exercise a sound discretion. Considering that there is a family of children, is this a case in which a divorce would be conducive to domestic harmony, and consistent with the peace and the morality of society? We think it is; and accordingly there must be a decree of divorce."[1]

[1] Motley *v.* Motley, 31 Maine, 490. See, however, on this point, Birbey *v.* Birbey, 15 Ill. 120.

§ 836. **Abandonment repented of.** — In an Indiana case, where the wife was the complaining party, it appeared that before the marriage she had been divorced from a former husband who was still living. Then the second husband, and perhaps the wife also, became convinced by texts of scripture that the second marriage was forbidden by the divine law, and they separated under articles. Soon after the separation the husband entreated her to return to cohabitation, but she refused and brought the divorce suit, on the ground of his conduct as thus described. But the court deemed the cause to be insufficient, and denied her prayer.[1]

[1] Ruby *v.* Ruby, 29 Ind. 174.

END OF VOL. I.